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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DR. HARRY POWER,

Petitioner,

vs.

RUTGERS, THE STATE UNIVERSITY and RICHARD FOLEY, DEAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a tenured public university professor entitled to procedural due process where, under the terms of his union contract and university practice, he reasonably expected to (1) be considered for a promotion, (2) proceed with a mutually-agreed upon grievance process and (3) function in the customary manner of a university professor?

2. When does an employment agreement in the public sector constitute a protected property interest that the employer may not deprive without due process?

3. May a public university deny a tenured professor his property rights by sanctioning him on the basis of allegations to which he was never confronted?

LIST OF PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AMENDMENT INVOLVED	2
STATEMENT OF THE CASE	2
1. Summary of the facts	2
2. The promotion remand	2
3. The sexual harassment complaint	5
4. The March 28, 1994 meeting with petitioner	6
5. The March 29, 1994 meeting with Burger and Meagher	7
6. Respondents' failure to confront petitioner with the new charges	7
7. Dean Foley's decision and the imposition of sanctions	8
8. Petitioner's sanctions	11
9. The decisions below	12
REASONS FOR GRANTING A WRIT OF CERTIORARI	12

Page

THE THIRD CIRCUIT'S SUMMARY AFFIRMANCE OF THE DISTRICT COURT'S OPINION IGNORED THIS COURT'S PRECEDENTS GOVERNING A PUBLIC EMPLOYEE'S RIGHT TO DUE PROCESS 12

POINT I: THE THIRD CIRCUIT IGNORED SUPREME COURT PRECEDENT IN SUMMARILY AFFIRMING THE DISTRICT COURT'S CONCLUSION THAT PETITIONER DID NOT HAVE A PROTECTIBLE PROPERTY INTEREST 13

POINT II: ALTERNATIVELY, CERTIORARI IS WARRANTED TO RESOLVE AN ISSUE WHICH IS RIPE FOR SUPREME COURT REVIEW: WHICH CONTRACTUAL RIGHTS CONSTITUTE A PROPERTY INTEREST 16

A. The decision below exposed an issue which this Court has not squarely addressed 16

B. The decision below conflicts with a decision of the Second Circuit 17

POINT III: THE THIRD CIRCUIT'S SUMMARY AFFIRMANCE OF THE DISTRICT COURT OPINION VIOLATES THIS COURT'S COUNSEL THAT PUBLIC EMPLOYERS CANNOT ASSIGN DISCIPLINE WITHOUT ACCORDING THE EMPLOYEE NOTICE OF THE CHARGES AND AN OPPORTUNITY TO RESPOND.... 19

CONCLUSION 21

Page

APPENDIX

June 24, 1997 Opinion of the United States Court of Appeals for the Third Circuit ..... App 1

October 3, 1996 Opinion of the United States District Court for the District of New Jersey ..... App 3

Letter, Dean Richard Foley to Associate Dean Barbara Bender, dated May 16, 1994 ..... App 26

TABLE OF AUTHORITIES

Cases:	**Page**
Anderson v. Liberty Lobby, 477 U.S. 242 (1986)	12
Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)	13, 15, 16, 17
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)	13, 20
Ezekwo v. New York City Health and Hospitals Corporation, 940 F.2d 774 (2d Cir. 1991)	14, 18
Kovats v. Rutgers, The State University, 822 F.2d 1303 (3d Cir. 1987)	18
Perry v. Sindermann, 408 U.S. 601 (1972)	16, 17
Constitutional Amendments:	
U.S. Const. Amend. XIV	2
Statutes:	
28 U.S.C. sec. 1254	2
Supreme Court Rules:	
Supreme Court Rule 10	*passim*
Supreme Court Rule 13.1	1
Other Authority:	
Corbin on Contracts	16

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dr. Harry Power, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The Court of Appeals' opinion is unreported and is reproduced in the Appendix as App. 1. The district court's opinion is unreported and is reproduced in the Appendix as App. 3.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 24, 1997. Pursuant to Supreme Court Rule 13.1, this petition is

filed within 90 days of the date of entry. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL AMENDMENT INVOLVED

Section 1 of the 14th Amendment to the United States Constitution reads, in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"

STATEMENT OF THE CASE

1. *Summary of the facts*

After petitioner, a tenured faculty member at respondent Rutgers University, grieved a denial of promotion, the parties agreed to a timely remand procedure which respondents thereafter unilaterally suspended when they learned that one of petitioner's graduate students planned to file a sexual harassment complaint against him. The complaint was filed after the date scheduled for the remand. Petitioner denied the harassment allegations and offered extrinsic proof that the claims were factually erroneous. However, respondents accepted the story without questioning the complainant or otherwise attempting to reconcile their competing accounts. Respondents met with petitioner to discuss the sexual harassment allegations and, in the course of resolving the harassment complaint, they considered unrelated, unsupported allegations, including petitioner's alleged vindictive and violent propensities and irresponsible classroom conduct. Respondents never confronted petitioner with these allegations and meted out sanctions which admittedly denied him the right to function in the customary manner of a professor, citing these other charges. The sanctions also denied petitioner his right to review the denial of promotion.

2. *The promotion remand*

In mid-June 1992, petitioner, an eminent avian sociobiologist who had been teaching at Rutgers for 16 years and obtained tenure there effective July 1981, learned that respondents had denied him a promotion to full professor. (Ja628, 697).

Before the formal denial, petitioner learned that the Appointments and Promotions Committee ("A & P Committee"), advisory to the Dean of the New Brunswick Faculty of Arts and Science in the promotion evaluation process, had raised questions concerning fewer than one percent (Ja717) of petitioner's anonymous student evaluations which criticized him for allegedly using sexually explicit language in his classes.[1]

Thereafter, based upon these sparse student comments, the Dean of the Faculty of Arts and Sciences, Dr. Richard McCormick, sought to pressure petitioner to remove himself for consideration for the rank of Full Professor. (Ja581-82; 910; 1430-31).

Eventually, despite the unanimous support (14-0) of Dean McCormick, his own department, Biological Sciences, and letters of support from two female professors who co-taught the course where the sexual comments were anonymously alleged to have been made (Ja708-09, 713), the Promotion Review Committee ("PRC") recommended that the President deny petitioner's promotion and he did so. (Ja628).

After learning about his promotion denial, petitioner filed a formal grievance which, *inter alia*, alleged that the selective use of the student comments violated university rules and respondents had arbitrarily and unfairly denied him the promotion. (Ja706-13). Petitioner noted that virtually every student evaluation had been positive and that, in 16 years, no student had filed a complaint against him. Petitioner contended that the A & P Committee's highly selective use of negative comments violated Article X of the AAUP-University contract which required that the narrative of each evaluative body be consistent with the record as a whole as presented in the

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[1] The record reflects that almost every student submitting narrative comments on his or her evaluation form for petitioner made no mention of any sexually explicit comments and the university made no inquiry to determine whether petitioner had made such comments (which he denies making) (Ja716-17).

candidate's promotion packet. (Ja714). Under the Collective Bargaining Agreement between the American Association of University Professors and Rutgers University, (hereafter "CBA"), after a successful grievance, the union or the professor and the campus provost structure a timely remand review to remedy the deficiencies identified in the flawed promotion process. (Ja618).

By the end of April 1993, petitioner and the provost's office had agreed upon an appropriate remand. (Ja335, 765). In conjunction with the Chair of the Department of Biological Sciences, the Dean's office would "undertake ... a thorough review of this issue and ... prepare a formal report describing your conclusions with regard to the conduct alleged by several of the students in the course [(General biology, Spring 1989)]". (Ja765). This report would then go directly to the PRC where, in the normal course of events, it would have resulted in a recommendation for promotion to full professor retroactive to July 1, 1992.

Respondents were required to complete the remand by Fall 1993. (Ja1562-63). As respondent's Vice President for Faculty Affairs, Jean Ambrose, conceded, "[r]emands are ordinarily implemented as soon after they are constructed as possible." (Ja1543). Dean Foley testified that he was "mandated" to implement the remand by late Fall, in time for the following year's promotion round. (Ja1616-17, 1664, 1735). Respondents had no university rule which permitted the Dean to hold the remand proceeding in abeyance pending the outcome of the sexual harassment inquiry. (Ja1564).

Despite this mandate, respondents suspended the remand process (Ja1562) without notifying petitioner. (Ja1619). Respondents effected the suspension because of a graduate student's unsupported sexual harassment complaint and anonymous allegations that petitioner had made inappropriate classroom comments. (1561-662). *See generally*, sec. 3, *infra*. In addition, Dean Richard Foley's March 16, 1994 letter finding petitioner guilty of sexual harassment and other transgressions with which petitioner was never confronted (*see*

sec. 7, *infra*), effectively tabled the remand process as the sanction included a three-year delay of the promotion process. (Ja607). Petitioner's due process claim asserts that respondents *never* confronted him with allegations of his alleged violent propensity although they were grounds for his sanction.

3. *The sexual harassment complaint*

In May 1993, petitioner commenced field work with Eileen Maher, a female graduate student. As he had done for 20 years, petitioner traveled to a remote part of Montana and utilized his bird-watching facilities on property owned by James Gasvoda, a Montana rancher. Before the summer's end, Maher determined to file a sexual harassment complaint against petitioner.

After learning that Maher planned to file the sexual harassment complaint, an associate dean, Karen Stubaus, spoke with Jean Ambrose, Vice President for Faculty Affairs, who advised her to hold in abeyance the agreed-upon remand promotion review because to proceed would not be in the public interest. (Ja1561, 1899c-d). This advice was given several months *before* Maher filed any written complaint against petitioner.

In early September 1993, Maher filed an eight-page written complaint which alleged that petitioner had sexually harassed her (Ja375).

In October 1993, petitioner submitted a lengthy reply to Maher's allegations. (Ja384-531). He denied that he had engaged in sexual conduct and disputed all of her allegations.[2]

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[2] The district court distorted petitioner's reply to Maher's complaint by taking his explanations out of context. Most egregiously, by cutting and pasting the record, the district court suggested that petitioner subjected Maher to *quid pro quo* sexual harassment. App. 7-8. Contrary to the district court opinion, petitioner did not decide that he wanted nothing to do with Maher because she was not romantically interested in him. He came to this conclusion because, over time, he came to believe she was

(Footnote continued)

4. *The March 28, 1994 meeting with petitioner*

Having failed to both properly investigate Maher's complaint and implement the remand and thereby place prior students' stray negative comments in context, Dean Foley and administrators Karen Stubaus and Noemie Koller met with petitioner on March 28, 1994 to discuss Maher's sexual harassment complaint. (*See, e.g.*, Ja537). Stubaus' contemporaneous notes show that, during the meeting, she was busy drafting sanctions against him, not listening to his explanation of what happened in Montana. (Ja588). At this meeting, no one told petitioner that his alleged classroom statements (which the grievance committee had flagged) (Ja745-46) were considered relevant to resolution of Maher's complaint. No one asked petitioner to respond to the allegation that he had made them. (Ja1354-55). By then, according to Stubaus, respondents had resolved to use these prior, disputed statements

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dangerous and would likely file a sexual harassment complaint against him if she did not get her way during their field studies. Petitioner was revulsed at Maher because he concluded that she was plotting to destroy her boyfriend's career. (Ja395-96). Indeed, petitioner continued to work with Maher long after reaching the conclusion that she posed this threat to him and did not withhold professorial support from her. The district court cited respondents' Statement of Undisputed Facts (Ja55) for the proposition that petitioner wished to cease professional relations with Maher after she rebuffed his advances. While that document (prepared in support of respondents' summary judgment motion) recounts *part* of petitioner's deposition transcript and is excerpted to suggest that he commenced a professional relationship with Maher for personal reasons, it omits a critical portion: petitioner testified that he wanted to continue the professional relationship. (Ja125).

Also, implying that petitioner subjected Maher to sexual touching, the district court concluded that he brushed himself against Maher in an excited state. (App. 8). This inflammatory view of the facts distorts what really happened: While watching birds from the machine shop in the course of their field studies, petitioner moved from one side of Maher to the other and accidentally brushed her body in a non-sexual manner. Petitioner was not *sexually* excited, as the district court's formulation may be construed, but excited by the numerous birds available for view. (Ja408-09).

against him. (Ja1354). But, these statements were *not* the subject of the March 28 meeting. (Ja1356).

5. *The March 29, 1994 meeting with Burger & Meagher*

The day after meeting with petitioner for the avowed purpose of confronting him with adverse evidence, Koller and Stubaus met with Dr. Joanna Burger and Dr. Tom Meagher, two members of the Department of Biological Sciences. (Ja1449). Dean Foley testified that this meeting was held to "speak to them about Harry Power's behavior in the department, his relationship with other students and graduate students." (Ja1684). Stubaus testified that the meeting was related to the Maher complaint, but went beyond it. (Ja1375). She could not recall any basis for believing that Meagher or Burger had any information pertinent to the Maher complaint. (Ja1377). Rather, Burger had contacted Koller at some unspecified prior date to complain about petitioner and she desired such a meeting. (Ja1133).

At the March 29 meeting, Burger made numerous accusations against petitioner, ranging from mention of some (never-occurring) effort on his part to grope some unnamed graduate student's breast (at some unspecified date in some unknown year) (Ja1142) to personal complaints that petitioner raised his voice at her during numerous collegial contacts in their respective offices and that she feared him because he was "violent."

Stubaus stated that she never followed up on (or tried to corroborate) Burger's allegations, specifically making no effort to contact the graduate student petitioner allegedly tried to grope. (Ja1146-47, 1379-80). She and Koller told Dean Foley about their meeting, but Stubaus could recall no direction from Dean Foley to follow up. (1381-82).

6. *Respondents' failure to confront petitioner with the new charges*

Respondents did not confront petitioner with *any* of the charges which Burger made against him. (Ja1140). No university investigator ever contacted petitioner's department chair,

Denhardt, or the vice chair, Dennis, to ask about petitioner's deportment. (Ja1449-51, 1899b-c, 1701). As noted, respondents failed to notify petitioner that the following allegations were relevant to its inquiry: petitioner's alleged vindictive and violent propensity and his alleged offensive classroom statements and his alleged efforts to grope a graduate student's breasts.

Stubaus testified that Dean Foley had other information upon which he predicated his conclusion that petitioner was a violent person. This allegedly came from Koller, who, Stubaus recounted, "had had conversations with the faculty members in biological sciences concerning their fear of Dr. Power." (Ja1383).

7. *Dean Foley's decision and the imposition of sanctions*

On May 16, 1994, without confronting petitioner with Burger's charges about him, Dean Foley signed a lengthy memorandum of findings concluding that petitioner was guilty of sexual harassment and, more generally, was a violent and hostile person who had previously engaged in sexually harassing conduct. (Ja593) (The May 16, 1994 memorandum is annexed hereto as App. 32). In drafting this document, Dean Foley excluded evidence which favored petitioner, like the letters from his supportive female graduate students (Ja1743) and the overwhelming preponderance of student comments which positively evaluated petitioner's teaching and referenced no untoward sexual comments. (Ja716, 745).

After making these findings, Dean Foley subsequently conceded that he did not even know whether the charge that petitioner had sought to grope the breasts of an unnamed graduate student was rumor or fact or in what decade this incident allegedly occurred. (Ja1690). He did know that the student purportedly subject to this attack had never complained. (Ja1692). Dean Foley also did not know if Burger's comments were rumors (Ja1688) or she witnessed untoward conduct. (Ja1687).

Nevertheless, to substantiate his adverse conclusions, Dean Foley relied on the same student comments which the Grievance Committee had directed be studied. He also relied upon Burger's allegations made on March 29, 1994 about petitioner's alleged violent proclivities. Despite the grievance committee's express rejection of selective reliance by the A & P committee upon a handful of anonymous student comments (three out of 1330) (Ja746), Dean Foley repeated this same tactic to punish petitioner without making a comprehensive inquiry to determine the validity of these comments as directed by the remand. (Ja1708). For instance, no one had spoken with the female professors and graduate students who had submitted letters refuting the claim that petitioner made sexually offensive comments during his lectures. (Ja706-13).

In the most relevant section, Dean Foley's report reads:

> Equally disturbing were conversations members of my staff had with several faculty members in the Department of Biological Sciences. They are very fearful of being identified by Professor Power and thus I cannot go into detail regarding incidents or individuals, but *they recounted a history of Professor Power as a violent individual and as one who has regularly made sexually inappropriate comments to students and as one who, in an incident well known in the Department, had attempted to grab both breasts of a new female graduate student in one of the halls of Nelson Labs. They also spoke of how he has retaliated against those who do not support him, students and faculty alike.* When asked why none of these incidents had been reported to the Dean's Office before, the faculty members replied that "no one thought the Administration would do anything about it," and that everyone was afraid Harry would find out, and would "go after them", both physically and professionally.
>
> They found it easier and safer to go about their business and to stay out of his way.

> *Obviously, this situation cannot be permitted to continue."* (Ja606) (emphasis added)

Dean Foley made clear that he was not only sanctioning petitioner for allegedly sexually harassing Maher, but for his alleged violent proclivities -- an allegation with which petitioner was never confronted. He stated:

> Under the terms of the *Procedures for Making Complaints Under the University Policy on Sexual Harassment*, distributed to the University Community by President Francis Lawrence via a memorandum of March 26, 1993, it is my duty to "send a written statement of [my] findings and a description of the actions taken if any, to the individual who initially referred the complaint." I have determined on the basis of the investigation conducted by me and my staff and on the documents submitted that Professor Power engaged in sexually harassing behavior with regard to his graduate student, Eileen Maher. *In addition, Professor Power's personnel file reveals that sexually inappropriate or offensive comments have been an issue in Professor Power's teaching evaluations in the past. Further, several individuals noted Professor Power's reputation as a violent person, some having actually witnessed his outbursts. These aspects of Professor Power's behavior and teaching disturb me, as well as leave me concerned regarding the physical safety of those around Dr. Power. In light of all I have read and heard, I feel it is advisable that we in the University take the following actions...* (Ja606-07) (emphasis added).

Other than Maher's sexual harassment complaint, petitioner received no notice of these allegations which resulted in the sanctions. These allegations included Burger's comments -- made after petitioner met with Dean Foley -- that he had violent proclivities and made offensive classroom comments. Dean Foley provided petitioner no opportunity to refute them

(Ja1687, 1693, 1702-03) and testified that these matters were the basis of his conclusions and sanctions. (Ja1694).

In addition, while including in his report to Bender a charge that petitioner had sought to grope the breasts of an unnamed graduate student, Dean Foley conceded he did not even know whether this was rumor or fact or in what *decade* this incident allegedly occurred. (Ja1690). He did know that the student purportedly subject to this attack had never complained. (Ja1692). Dean Foley also did not know if Burger's comments were rumours (Ja1688) or if she witnessed untoward conduct. (Ja1687).

8. *Petitioner's sanctions*

Dean Foley imposed a potpourri of sanctions which Stubaus cooked up as she listened to petitioner's defense to Maher's claims on March 28, 1994. (Ja607). *See also,* Ja587. This punishment rendered petitioner a pariah in the university community, unable, in Dean Foley's own words, to perform "the customary duties of a faculty member at this university." (Ja607).

Of 800 faculty under Dean Foley, only petitioner was prohibited from being alone with undergraduate or graduate students, male or female, for three years. (Ja1779). Respondent barred petitioner from sponsoring graduate students or using teaching assistants, penalties unprecedented in the College. (Ja1786, 1899b). He was also disallowed from sponsoring students doing independent study and research or to sponsor graduate or post-doctoral students. (Ja607). He could no longer hold regular office hours, but instead could only meet with students in public places and then with another adult present as a chaperon. (Ja607).

In addition, Dean Foley canceled the agreed-upon remand and ruled that petitioner could not be considered for promotion for three years, and then only if no person *complained* about his speech. (Ja607). Ambrose admitted that no university policy provided the Dean with the authority to cancel the remanded promotion review. (Ja1582). Dean Foley's letter

did not require that the university substantiate any such complaint, but, fairly read, extended non-consideration of petitioner's promotion merely on the basis of student complaints.

Dean Foley explained that male students were included in the prohibitions because he had received "some testimony" that they were afraid of petitioner. (Ja1791). Dean Foley never advised petitioner of any such evidence or claim against him.

9. *The decisions below*

Following discovery, respondents moved for summary judgment. The district court granted the motion, holding, *inter alia*, that petitioner had failed to establish a property interest and that respondents had afforded him due process. App. . The Third Circuit Court of Appeals summarily affirmed the district court opinion. App. 1.

REASONS FOR GRANTING A WRIT OF CERTIORARI

THE THIRD CIRCUIT'S SUMMARY AFFIRMANCE OF THE DISTRICT COURT'S OPINION IGNORED THIS COURT'S PRECEDENTS GOVERNING A PUBLIC EMPLOYEE'S RIGHT TO DUE PROCESS

The Third Circuit affirmed an opinion which resolved disputed fact issues, eviscerated the due process clause and branded a respected and tenured professor a vindictive and violent man and a sexual harasser who breached the trust of the University and its students *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial").

In affirming summary judgment, the Third Circuit violated the most elementary rules governing due process and dismissed the complaint despite evidence that respondents predicated petitioner's sanctions, in part, on serious and unproven charges to which he was denied an opportunity to respond. The courts below ignored Hornbook law governing

procedural due process: before imposing sanctions, a public employer must afford an employee (1) notice of the charges and (2) an opportunity to respond. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985).

Certiorari is proper to correct the Third Circuit's erroneous decision which squarely conflicts with relevant Supreme Court decisions interpreting the Due Process Clause. *See*, Supreme Court Rule 10(c).

POINT I

THE THIRD CIRCUIT IGNORED SUPREME COURT PRECEDENT IN SUMMARILY AFFIRMING THE DISTRICT COURT'S CONCLUSION THAT PETITIONER DID NOT HAVE A PROTECTIBLE PROPERTY INTEREST

The Due Process Clause of the Fourteenth Amendment disallows state actors from depriving any person of life, liberty or property without due process of law. *See generally, Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985). As this Court has explicitly recognized that a public employer's practices can create property interests, certiorari is warranted as the Third Circuit's affirmance of the district court's decision radically departs from established Supreme Court precedent.

Property interests are not created by an abstract need or desire for them. Rather, the plaintiff must establish a legitimate claim of entitlement. "A person's interest is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to that benefit that he may invoke at a hearing." *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972). *See also, id.* ("It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined"); *Ezekwo v. New York City Health and Hospital Corporation,* 940 F.2d 774, 782 (2d Cir. 1991)("While the presence of such a [written] provision obviously would make

the existence of the right much more apparent, its absence does not foreclose the possibility ... In *Roth*, the Supreme Court noted that principles of contract law recognize that not every term of a contract must be reduced to writing. Additional contractual provisions may be 'implied' into a contract as a result of a course of dealings between the parties. The parties through their conduct and practice can create additional rights and duties").

Under the terms of the collective bargaining agreement between Rutgers and the AAUP and by dint of university practice, a rational factfinder should have concluded that petitioner had (and relied upon) three protected property rights of which respondents deprived without due process.

First, the record supports the inference that petitioner had the right to be *considered* for promotion to the rank of full professor according to the AAUP-University contract. As respondents appointed qualified tenured faculty members as full professors, *a fortiori*, petitioner reasonably expected that they would fairly consider him for the position. Indeed, Dean Foley, in his memorandum finding petitioner guilty of sexual harassment, sanctioned petitioner by delaying his evaluation for promotion for at least three years. (Ja607). This sanction clearly meant that, as punishment, petitioner would not immediately receive the benefit of the promotion review process.

Second, petitioner had the right to the benefit of his grievance procedure, i.e., the remand to which he agreed in writing with university representatives in late April 1993 and which respondents breached unilaterally pending resolution of Maher's sexual harassment complaint. Respondents admitted that remands should be expeditiously implemented and that, had petitioner's remand proceeded as planned, it could have been implemented by Fall 1993. (Ja1543, 1616-17, 1664, 1735). The remand agreement represents precisely the kind of mutual understanding that this Court has recognized as a protectible property interest. *See*, *Board of Regents of State Colleges v. Roth*, 408 U.S. at 577 ("[p]roperty interests ... are created and

their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits"). In the district court opinion that the Third Circuit summarily affirmed, the court did not even address petitioner's argument that the agreed-upon remand secured him a property interest of which respondents could not deprive him without due process. As the remand was to correct the faulty process that resulted in petitioner's promotion denial, delaying consideration of his promotion for at least three years necessarily killed the grievance remand until respondents determined to resume the promotion schedule.

Third, as a matter of University practice, petitioner had the right to all the privileges accorded faculty members generally, namely the right to sponsor graduate students and employ them as teaching and research assistants, the right to have office hours and assist his students, and the right to apply for research grants. Respondents stripped petitioner of the latter right by ddenying him the right to employ graduate students. As Dean Foley recognized in his May 16, 1994 memorandum which concluded petitioner was guilty of sexual harassment and other alleged improprieties to which he was not accorded an opportunity to respond, these represent a faculty member's right to function in a customary manner. *See*, Ja607 (Dean Foley concluded his findings and sanctions recommendation by stating, "[i]t is my hope that these findings will both safeguard those around him and encourage him to alter his behavior for the better, *so he can return to the customary duties of a faculty member at this University*") (emphasis supplied). A rational factfinder should conclude that, as a tenured faculty member, petitioner reasonably relied on his entitlement to the kind of faculty privileges that respondents denied him. *Board of Regents of State Colleges v. Roth*, 408 U.S. at 577.

In rejecting petitioner's argument that he lacked any property interest in a faculty member's customary duties, the district court held that "no written contract or document exists entitling Plaintiff to these 'benefits' which may only be

terminated for cause." App. 17. However, as this Court's precedents recognize, no such written entitlement is required to create a cognizable property interest, only respondents' "existing rules or understandings." *Roth*, 408 U.S. at 577. *See also*, *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) ("absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in reemployment. For example, the law of contracts in most, if not all, jurisdictions, long has employed a process by which agreements, though not formalized in writing, may be 'implied'") (citing 3 A. Corbin on Contracts secs. 561-572A (1960)).

Accordingly, certiorari is warranted to correct the Third Circuit's mis-application of this Court's well-settled authority governing property interests. *See*, Supreme Court Rule 10(c).

POINT II

ALTERNATIVELY, CERTIORARI IS WARRANTED TO RESOLVE AN ISSUE WHICH IS RIPE FOR SUPREME COURT REVIEW: WHICH CONTRACTUAL RIGHTS CONSTITUTE A PROPERTY INTEREST

A. *The decision below exposed an issue which this Court has not squarely addressed*

As noted *supra*, the Third Circuit's summary affirmance of the district court's opinion ignored this Court's well-established principles governing property interests under the Due Process Clause. At the least, the court below exposed an issue which this Court has not squarely addressed: when does an employment agreement in the public sector constitute a property interest that the employer cannot deprive without due process?

In *Board of Regents of State Colleges v. Roth*, 408 U.S. at 577, this Court stated that property interests are "defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement

to those benefits." Similarly, in *Perry v. Sinderman*, 408 U.S. 593, 601 (1972), this Court held that, depending on the circumstances, a public university's non-contractual policies and practices could give rise to a property right.

Neither *Roth* nor *Perry* suggested that certain rules or understandings -- such as the right of a tenured public employee to be considered for a promotion -- could represent an abstract claim of expectation. The Third Circuit's contrary interpretation of the Due Process Clause finds no support in this Court's jurisprudence.

Accordingly, as this Court has not squarely addressed whether certain mutual understandings may predicate a legally-cognizable property interest, certiorari is warranted to resolve this open question. The Circuit Court has granted respondents carte blanche to avoid its obligations (in this case, an orderly promotion and remand process) and to impose overbroad sanctions that (1) could be extended on the basis of "reports" against petitioner (as opposed to proven charges) and (2) effectively cast a scarlet letter on a tenured university professor whose punishment stems, in part, from unproven (and disputed) claims about his violent deportment and other alleged misconduct to which respondents never accorded him an opportunity to respond. *See,* Supreme Court Rule 10(c).

B. *The decision below conflicts with a decision of the Second Circuit*

Certiorari is warranted for another reason: the Third Circuit's summary affirmance of the district court opinion conflicts with a decision of the Second Circuit which — unlike the court below — viewed public employment understandings and practices as sufficiently significant to create a property interest.

While several Circuit Courts have held that some contractual entitlements do not create property interests (*see, e.g., Kovats v. Rutgers, The State University*, 822 F.2d 1303, 1314 (3d Cir. 1987), the court below affirmed a district court opinion that a public employee's right to be considered for a

promotion is too abstract to constitute a property interest. However, the conclusion that petitioner's claimed entitlement is too trivial to warrant due process protection reveals an inter-circuit conflict that warrants certiorari review. *See*, Supreme Court Rule 10(a).

In Ezekwo v. Health and Hospitals Corporation, 940 F.2d 775 (2d Cir. 1991), the plaintiff was denied the Chief Resident position at a public hospital. *Id. at 778-79.* The employer argued that Ezekwo possessed only a unilateral expectation of becoming Chief Resident because neither her individual written contract nor the collective bargaining agreement referenced any formal right to the position. *Id.* at 782. However, since the "policies and practices" of the institution entitled Ezekwo to the position, the Second Circuit disagreed, holding that she was denied a property interest without due process. *Id.* at 783. The Court stated, "while every breach of public employment contract may not be a deprivation of property within the meaning of the Due Process Clause, the adverse action in this case was not the product of routine discipline. Nor did it involve such a trivial right to a specific vacation period. Here, the 'policies and practices' of the institution were such that an entitlement to the position of Chief Resident existed and the district court correctly so held." 940 F.2d 782-83 (citations omitted).

Like *Ezekwo*, petitioner was denied concrete benefits from which workplace practice accorded him a legitimate claim of entitlement: the right to be considered for a promotion and the right to all the privileges accorded faculty members. These expectations are hardly trivial. Unlike "the purported right to a specific vacation period," *Ezekwo*, 940 F.2d 783 (citation omitted), they each affected the most basic terms and conditions of petitioner's employment. However, unlike *Ezekwo*, the Third Circuit minimized petitioner's interest in these benefits and characterized them as abstract despite evidence from which a reasonable factfinder could conclude established University-wide practice which afforded professors like petitioner a legitimate claim of entitlement.

Accordingly, certiorari is warranted to settle the inter-circuit split exposed by the Third Circuit's summary affirmance of the district court opinion. *See*, Supreme Court Rule 10(c).

POINT III

THE THIRD CIRCUIT'S SUMMARY AFFIRMANCE OF THE DISTRICT COURT OPINION VIOLATES THIS COURT'S COUNSEL THAT PUBLIC EMPLOYERS CANNOT ASSIGN DISCIPLINE WITHOUT ACCORDING THE EMPLOYEE NOTICE OF THE CHARGES AND AN OPPORTUNITY TO RESPOND

In sanctioning petitioner, respondents credited allegations it never presented to him. As this Court has clearly stated that due process requires a public employer to afford an employee (1) notice of the charges and (2) an opportunity to respond, the Third Circuit's summary affirmance of the district court's opinion violated that principle and eviscerated due process. Certiorari is warranted to correct the Circuit Court's erroneous interpretation of this Court's due process precedents.

Viewing the record in the light most favorably to petitioner -- as the Third Circuit was required under elementary summary judgment principles -- respondents punished petitioner by crediting allegations they never presented to him. Dean Foley's lengthy statement of findings, dated May 16, 1994 specifically found that petitioner is a violent person who has subjected others to sexual harassment. To support these conclusions, Dean Foley relied upon allegations made by Professor Burger on March 29, 1994, *the day after* petitioner met with Dean Foley, Stubaus and Koller, as well as information provided Dean Foley by Koller from unnamed members of the Department of Biological Sciences. Critically, Dean Foley and his subordinates never informed petitioner of the charges made by Burger, Meagher and other unnamed members of his Department after the March 28 meeting and provided him with no opportunity to respond to them or to prepare a meaningful defense.

As no one confronted petitioner with these allegations, he lacked any notice of them. Respondents also never gave petitioner an opportunity to refute them. Respondents' derelictions ignored *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) as they did not provide petitioner with "*oral or written notice of the[se] charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story*"(emphasis supplied) (citations omitted). In relying upon these matters and reaching conclusions on the basis of them, respondents plainly denied petitioner due process.

The Third Circuit's affirmance of the district court decision violated the Due Process Clause and condoned a public university's effort to humiliate a respected, tenured professor by branding him a vindictive and violent man and sexual harasser who has breached the trust of the University and his students.

Certiorari is warranted to correct the Third Circuit's radical departure from Supreme Court precedent and to ensure that public employers afford their employees "the root requirement of the Due Process Clause ... that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Id.* at 542 (citations omitted) (emphasis in original).

CONCLUSION

This Honorable Court should grant the instant petition for writ of certiorari.

Dated: September 18, 1997
Goshen, New York

Respectfully submitted,

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APPENDIX

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5701

HARRY POWER, DR.,

Appellant

v.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY;
RICHARD FOLEY, Dean

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 94-04608)
District Judge: Honorable William G. Bassler

Submitted under Third Circuit LAR 34.1 (a)
June 23, 1997

BEFORE: GREENBERG, MCKEE, and WELLFORD* ,
Circuit Judges

(Filed: JUN 24 1997 1997)

JUDGMENT ORDER

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* Honorable Harry W. Wellford, Senior Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the order of the district court entered October 3, 1996, be and is hereby affirmed substantially for the reasons Judge Bassler set forth in his comprehensive opinion dated October 1, 1996.

Costs taxed against appellant.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Dr. Harry POWER, Plaintiff, v. RUTGERS, THE STATE UNIVERSITY and RICHARD FOLEY, DEAN, Defendants.	Civ. No. 94-4608 (WGB) *OPINION* FILED OCT 1 1996 AT 8:30_____M WILLIAM T. WALSH CLERK

APPEARANCES:

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BASSLER, DISTRICT JUDGE:

Plaintiff Dr. Harry Power, a professor at the New Brunswick campus of Rutgers, The State University ("Rutgers"), filed this lawsuit against Rutgers and Richard Foley, Dean of the Faculty of Arts and Sciences. In Counts One and Two, Dr. Power alleges that Rutgers deprived him of property and

liberty without due process of law when the University imposed certain restrictions upon him after concluding that he had sexually harassed a female graduate student. In Count Three, Dr. Power alleges that Rutgers breached an agreement to investigate the validity of student complaints about his classroom behavior and thereafter reevaluate him for promotion. Finally, in Count Four, Dr. Power alleges that Dean Foley defamed him by communicating to several Rutgers' administrators his conclusion that Dr. Power had committed sexual harassment.

This Court has jurisdiction over the federal claims arising under 42 U.S.C. § 1983 in this matter pursuant to 28 U.S.C. §1331, and supplemental jurisdiction over the state claims pursuant to 28 U.S.C. § 1367.

Defendants Rutgers and Richard Foley have now moved for summary judgment as to all four causes of action of Plaintiff Dr. Power's Complaint. For the following reasons, this Court hereby GRANTS summary judgment.

I. *BACKGROUND*

Plaintiff, Dr. Harry Power, is an Associate Professor in the Department of Biological Sciences in the Faculty of Arts and Sciences at Rutgers' New Brunswick campus. Stmt. Undisputed Facts, ¶11. During the 1991-1992 academic year, after evaluating Dr. Power for promotion from Associate Professor to the rank of full Professor, Rutgers denied the Promotion. *Id.* at ¶11.

The decision to deny the promotion was based in part on the fact that Dr. Power's file contained several student evaluations complaining about Dr. Power's repeated use of sexual, vulgar, and sexist comments in the classroom. *Id.* at ¶8-9. The comments included in student evaluations in Dr. Harry Power's personnel file include the following:

> Out of all the lectures he had given, there was only one lecture that he did not say one sexual comment. His comments ranged from him wanting to have sex

> with every female in the room to the size of his genitals. I found him rude and offensive. *Id.* at ¶7.
>
> Do you enjoy talking about sex all the time? I believe you try to bring it up as often as possible -- your attitude is really sexist. The lectures could do without your crude dirty jokes, they aren't funny after a while when overdone. *Id.* at ¶81.
>
> Sexual innuendos inappropriate i.e. -- how to trick a man -- no one marries bald headed women and similar statements. *Id.*
>
> His language (fuck, goddamn, son of a bitch, etc.) is most unnecessary. He is supposed to be an instructor and uses these words inappropriately. *Id.* at ¶79.

Dr. Power did not deny making a comment about his genitals, but rather attempted to defend his comment by stating it was made in the context of the course material. *Id.* at 17. The other comments he denied as inaccurate portrayals of his etiquette in the classroom. In light of these comments, together with concern over Dr. Power's academic and publication record, the promotion was denied during the 1991-1992 academic year. *Id.* at ¶11.

Pursuant to Article X of the collectively negotiated agreement between Rutgers and the Council of American Association of University Professors Chapters ("AAUP"), which represents the Rutgers' faculty members, Dr. Power filed a grievance over the denial of his promotion. *Id.* at ¶12. All promotion disputes are brought before the Grievance Committee, a committee composed of faculty members at Rutgers to resolve these grievances. *Id.* The Grievance Committee heard Dr. Power's grievance in March, 1993, and rejected eleven of the twelve bases that Dr. Power had advanced in his support. *Id.* at 13. The Grievance Committee concluded that the student evaluations had been given undue weight in the decision process as many positive evaluations existed alongside the negative evaluations. *Id.* at ¶14. As a result, the Grievance Committee recommended that prior to a remanded

evaluation, an investigation into the validity of 1989 student evaluations was necessary. *Id.* at ¶16.

To implement this recommendation, Dr. Power and Rutgers agreed that Dean Richard Foley, the dean overseeing Dr. Power's college, and David Denhardt, the Chair of the Department of Biological Sciences, would undertake a review of the 1989 student evaluation comments and would make a formal report of their findings. *Id.* at ¶17. This report was to be included with Dr. Power's file upon his reevaluation for promotion.

According to Dr. Power, had events followed their normal course, his promotion packet would have been remanded to the promotion review committee as soon as possible, which would have been the fall of 1993. However, Dean Foley decided to suspend the remand process due to the sexual harassment claim at issue and never informed Dr. Power that the remand was not being implemented.

In May of 1993, one of Dr. Power's female graduate students, Eileen Maher, went to Dr. Power's field laboratory in Montana to conduct research with him for her master's thesis. *Id.* at ¶24. From 1979 until 1993, Dr. Power solely had conducted field research with his graduate students in New Jersey rather than at his field site in Montana. *Id.* at ¶21. Merely sixty days after Ms. Maher began working with Dr. Power, Dr. Power suggested that Ms. Maher apply for a grant to study mountain bluebirds, a type of bird Ms. Maher knew nothing about at the time, at Dr. Power's study site in Montana. *Id.* at ¶22. She received the grant and arrived in Montana to begin field study with Dr. Power in May, 1993.

Dr. Power alleges that Ms. Maher sent him "signals" upon arriving in Montana, and he was interested in discovering whether Ms. Maher was interested in him. *Id.* at ¶47. He also made comments to her about needing a new wife. Dr. Power had previously been married to one of his former female graduate students, but divorced his wife in 1991. *Id.* at ¶21. Ms. Maher responded that she was not interested in him and that she was happy with her boyfriend. *Id.* at ¶48. From that

day, Dr. Power no longer wanted to work with Ms. Maher: "I left the conversation thinking she was not romantically interested in me, and I regretted ever having anything to do with her... I did not wish to continue a professional relationship." *Id.* at ¶49.

After that conversation, for the next month and a half, Dr. Power engaged in repeated acts of sexual harassment toward Ms. Maher. Though Dr. Power disputes that his acts rise to the level of sexual harassment, he does not dispute his acts. The acts Dr. Power admits to include: (1) brushing her hair from her face; (2) asking her to ride in a shopping cart; (3) telling her he might need to jump on her and hold her down or put a leash and collar on her to prevent her walking ahead of him; (4) touching her shirt and placing his hand on her buttock; and (5) brushing the front of his body against the back of her while he was excited. *Id.* at ¶50. Moreover, when Ms. Maher expressed her disgust at his conduct, Dr. Power told her "You have nothing to complain about, it's not as if I've thrown you up against a wall and felt you up!" *Id.* at ¶52. Dr. Power later answered Maher's allegation that he had touched her shirt and buttock not with a denial but with the statement, "It's not as though she has never been manhandled. What was her problem?" *Id.* at ¶51. In denying that these incidents rose to the level of sexual harassment, Dr. Power later attempted to justify each as an innocent act.

In addition Ms. Maher asserted that Dr. Power questioned her about her bra size while touching her back. *Id.* at ¶44. In his response to this accusation, Dr. Power told Rutgers officials that since he sorted her laundry, he held her undergarments in his hands and had no need to ask Ms. Maher her bra size. *Id.* at ¶45. Ms. Maher made further assertions that Dr. Power hugged her, asked if he could feel around her pocket for a pencil, joked about using forceps on her if she was not a "good girl," and told her she might get to cut the hair on his back.

As a result of these incidents, in late June, 1993, Ms. Maher cut short her research and left the field laboratory. *Id.* at ¶36.

She contacted a Rutgers University administrator responsible for investigating sexual harassment complaints among students, Barbara Bender, upon returning to Rutgers. Ms. Bender told Ms. Maher that she needed to put her allegations in writing and submit a formal complaint which would go to Associate Dean Karen Stubaus, the University official who would be handling her complaint. Apparently, Ms. Stubaus, upon learning that Ms. Maher was planning on filing a complaint against Dr. Power, approached Joan Ambrose, Vice President for Faculty Affairs, with the news of the incoming complaint. Ms. Ambrose advised that the agreed-upon remand promotion review ought to be held in abeyance pending the outcome of the complaint for sexual harassment. (Def. Br. at 10).

Upon hearing that Ms. Maher might file a complaint against him Dr. Power immediately contacted Rutgers, denied the allegation of sexual harassment, provided his supervisors with a copy of his General Notes, and demanded to be appraised of any complaint. Def. Br. at 7.

Ms. Maher filed her written complaint against Professor Power to Rutgers University officials in September of 1993, pursuant to Rutgers' sexual harassment policy. Stmt. Undis. Facts at ¶37. In her complaint, she detailed the various acts of sexual harassment and retaliation Dr. Power had committed.

Dr. Power submitted a long reply to Ms. Maher's allegations, denying that he had engaged in sexually aggressive conduct or sexual harassment of any sort and disputing the specifics of her allegations, yet acknowledging that he had initially had some interest in Ms. Maher when she arrived in Montana. Stmt. Undis. Facts at ¶40-53. Dr. Power put forth different theories as to why Ms. Maher had filed this complaint, including blackmail and retaliation for his rejection of her. *Id.* at ¶54-55.

After Dean Foley received Dr. Power's reply, Dean Foley set a meeting on November 22, 1993, directing Dr. Power to meet with himself, and his two Associate Deans, Noemie Koller and Karen Stubaus, to discuss the complaint. *Id.* at ¶56. Dean Foley invited Dr. Power to bring an AAUP

representative to the meeting. *Id.* at ¶57. Because Dr. Power insisted on bringing an attorney, Dean Foley adjourned the meeting. *Id.* at ¶58-59. As a result, the meeting amongst Dean Foley, his staff, Dr. Power, and the AAUP representative did not take place until March 28, 1994. *Id.* at ¶60-65. At this meeting, the Dean gave Dr. Power an additional opportunity to respond to the allegations. *Id.* at ¶65-71. Even after this meeting, Dean Foley invited Dr. Power to submit additional materials to supplement his response. *Id.* at ¶74-75. Dr. Power did submit an additional forty pages of documents, further stating that Ms. Maher's allegation might stem from the effects of isolation, weather related stress, borderline personality disorder, and/or an "odd temporal lobe condition." *Id.* at ¶69, 75.

After the meeting with Dr. Power, Dean Foley apparently met with Dr. Joanna Burger and Dr. Tom Meagher, two members of the Department of Biological Sciences. Def. Br. at 18. According to Associate Dean Stubaus and Koller, at this meeting, Dr. Burger made a number of accusations against Dr. Power, from a mention of his attempt to grope an unnamed graduate student's breast to personal complaints that Dr. Power had raised his voice at her and become "violent." *Id.* Dr. Burger later denied her statements, claiming, "I did not want to get involved in it, and I was worried about Harry's reaction." *Id.* at 19-20. Rutgers never informed Dr. Power about this meeting or any of the accusations. *Id.* at 21.

Dean Foley sent Dr. Power a letter of his findings as to Ms. Maher's allegations on May 16, 1994, upon completion of his investigation. Stmt. Undis. Facts at ¶82. Despite Dr. Power's efforts at raising a defense, the conclusion reached by Dean Foley was that Dr. Power had sexually harassed Ms. Maher, and thus he was subject to five disciplinary sanctions:

(1) Dr. Power would not be permitted to meet alone with students for at least three years and would have to conduct office hours in some public area;

(2) Dr. Power would not be permitted to oversee students on independent study or independent research projects;

(3) Dr. Power would not be permitted to have any students work on his grants and would be assigned no graduate students, post-doctoral students, teaching assistants, or graders.

(4) Teaching evaluations would he conducted for all of his classes and monitored for indications all inappropriate comments or behavior; and

(5) He would be ineligible to be evaluated for promotion for at least three years.

Stmt. Undis. Facts at ¶83. Dean Foley's report of the incident stated that individuals involved:

> [R]ecounted a history of Professor Power as a violent individual and as one who has regularly made sexually inappropriate comments to students...he has retaliated against those who do not support him, students and faculty alike... They found it easier and safer to go about their business and to stay out of his way.

Def. Br. at 24. In the section on "findings," Dean Foley reported that he had:

> [D]etermined on the basis of the investigation conducted by me and my staff and on the documents submitted that Professor Power engaged in sexually harassing behavior… In addition, Professor Power's personnel file reveals that sexually inappropriate or offensive comments have been an issue in Professor Power's teaching evaluations in the past. Further, several individuals noted Professor Power's reputation as a violent person.

Id. Dean Foley sent his findings to Dr. Power's department chair and the associate deans of the FAS, the Assistant Vice

President for Faculty Affairs, the Vice Chair of Academic Affairs for Dr. Power's department, an attorney in Rutgers' Office of Employment Counsel, the graduate program director, and the dean and associate deans of the Graduate School. Stmt. Undis. Facts at ¶84. At no time did Dean Foley communicate his decision that Dr. Power had sexually harassed Ms. Maher to anyone outside this group. *Id.* at ¶85.

Dr. Power asserts that Rutgers did not do any investigation to determine the truth of Ms. Maher's allegations, as Dean Foley failed to contact any of the people who might corroborate or dispute her account of the events. Def. Br. at 12. Furthermore, Dr. Power also submitted five letters from former female graduate students in his defense denying that Dr. Power had ever engaged in any improper conduct.

Rutgers has a grievance and arbitration procedure for the resolution of disputes. *Id.* at ¶88. Dr. Powers considered filing a grievance, but opted not to challenge the terms of the restrictions imposed on him nor the fact that the remand, in which the validity of the 1989 student evaluations was to have been determined, had not taken place. *Id.* at ¶99. Instead, after consulting his attorney and AAUP representative, Dr. Power filed this lawsuit.

II. *LEGAL ARGUMENT*

A. *Summary Judgment Standard*

The standard for granting summary judgment pursuant to Federal Rule of Civil Procedure 56 is a stringent one. Summary judgment is appropriate only if all the probative materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Hersh v. Allen Prods. Co.*, 789 F.2d 230, 232 (3d Cir. 1986); *Lang v. New York Life Ins. Co.*, 721 F.2d 118, 119 (3d Cir. 1983). In determining whether there remain any genuine issues of material fact, the court must resolve all reasonable doubts in favor of the nonmoving party. *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983) *cert. dismissed,* 465 U.S. 1091

(1984); *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972). Significantly, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Under the standards announced by the Supreme Court's trilogy in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247-48 (emphasis in original). "The substantive law governing the dispute will determine which facts are material, and only disputes over those facts 'that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *Farid S. Khair v. Campbell Soup Co.*, 893 F. Supp. 316, 326 (D.N.J. 1995) (citations omitted). Indeed, where the moving party has made a property supported motion for summary judgment, it is incumbent upon the nonmoving party to come forward with specific facts to show that there is a genuine issue of material fact for trial. *Anderson*, 477 U.S. at 248. Thus, once the moving party has carried its burden of establishing the absence of genuine issues of material fact, the nonmoving party "may not rest upon mere allegations or denials" of its pleadings, Fed. R. Civ. P. 56(e), but must produce sufficient evidence that will reasonably support a jury verdict in its favor, *Id.* at 249; *J.E. Mamiye & Sons, Inc. v. Fidelity Bank*, 813 F.2d 610, 618 (3d Cir. 1987) (Becker, J., concurring), and not just "some metaphysical doubt as to material facts." *Matsushita*, 475 U.S. at 586.

Moreover, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative summary judgment may be granted." *Anderson*, 477 U.S. at 249-50. "Consequently, the court must ask whether, on the summary

judgment record, reasonable jurors could find facts that demonstrated, by a preponderance of the evidence, that the non-moving party is entitled to a verdict." *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 860 (3d Cir. 1990) *cert denied* 499 U.S. 961 (1991).

B. *Plaintiff's Claims.*

1. Plaintiff's First Cause of Action Does Not Constitute A Property Interest Under The Fourteenth Amendment Right to Due Process.

In order to prevail on his due process claims, Plaintiff must establish that he possessed a property interest protected by the due process clause. As the Supreme Court established, a property interest protected by the due process clause of the Fourteenth Amendment exists only if there is a "legitimate claim of entitlement" and not merely a unilateral expectation. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

A district court in the Third Circuit spoke on the issue of whether Rutgers' tenure procedures and standards sufficiently restrict the discretion of the University such that plaintiffs can claim more than a subjective expectation of promotion in *Varma v. Bloustein*, 721 F. Supp. 66 (D.N.J. 1988), *aff'd*, 860 F.2d 1077 (3d Cir. 1988), *cert. denied*, 489 U.S. 1014 (1989). In *Varma*, the court found that plaintiffs did not have a property interest in being awarded tenure that would be protected under the Fourteenth Amendment to the Constitution. *Id.* at 72. The court was guided by the Third Circuit's instruction in its affirmance of its initial decision that the fact that specific procedures for the tenure process have been set out does not create property interests protected by the Due Process Clause, even though it may give rise to a claim for breach of contract. *Id.* at 69, citing *Kovats v. Rutgers, The State University*, 822 F.2d 1303, 1214 (3d Cir. 1987). Because the right to be considered for a promotion is more along the lines of a contract right, an "abstract type of unilateral expectation," it is insufficient to rise to the level of a protected property interest. *Unger v. National Residents Matching Program*, 928 F.2d 1392,

1397-99 (3d Cir. 1991). Although Plaintiff argues that his right to be considered for a promotion to full Professor is a protected property right, this argument is clearly against Third Circuit Law.

In addition to the promotion issue, Plaintiff argues that he has been deprived of the right to meet with students alone and have student assistants. However, no written contract or document exists entitling Plaintiff to these "benefits" which may only be terminated for cause. Without a property interest in the "benefits" the sanctions have taken away from Plaintiff, Plaintiff's due process claim must be dismissed. *See Sanguigni v. Pittsburgh Bd. Of Public Educ.*, 968 F.2d 393, 401 (3d Cir. 1992).

2. Plaintiff Received All Process To Which He Was Due.

Even assuming, arguendo, that Plaintiff did have a protected interest, Rutgers has satisfied the essential due process requirements, that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306. 313 (1950). Due process requires that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

The type of pre-deprivation hearing required by the due process clause varies according to the nature of the deprivation and the available post-deprivation remedies. The court must balance the individual's interest in maintaining the property or liberty interest, the risk of an inaccurate decision, and the governmental interest in preventing the promotion of an unsatisfactory candidate. *Loudermill*, 470 U.S. at 542-43. "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See Friendly, 'Some Kind of

Hearing,' 123 U.Pa. L.Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Loudermill*, 470 U.S. at 546. As the Supreme Court recognized, requiring more than these steps would be an unwarranted intrusion on the government's interest in acting to make decisions regarding its employees. *Loudermill*, 470 U.S. at 546.

The Third Circuit recently applied *Loudermill*'s holding to a case that is quite similar to this case and held that the plaintiff received all the process to which he was entitled. *McDaniels v. Flick*, 59 F.3d 446 (3d Cir. 1995). In *McDaniels*, a college discharged a tenured full professor for sexual harassment of a student. *Id.* After the student filed a complaint, the college's director of personnel services summoned the professor to a meeting with the professor's dean, only telling the professor that the meeting concerned a "student problem." *Id.* at 451. Only at the start of the meeting did the professor learn of the charge of sexual harassment. *Id.* At that same meeting, the dean informed the professor that he was going to recommend the professor be terminated. *Id.* When the Professor was shown the student's allegations at that meeting, he denied the allegations and attributed them to the fact that the student was "off the wall." *Id.* at 452. After that meeting, the professor consulted with an attorney and wrote a letter responding to the student's allegations. *Id.* One month later, the Board of Trustees voted to terminate the professor's employment with the college. *Id.* at 453.

When the professor brought suit alleging that his due process rights had been violated, the Third Circuit found that even though a tenured professor does have a property interest in his employment and is entitled to the pre-termination requirements of notice and an opportunity to respond as set forth in *Loudermill*, a tenured professor does not deserve more than these requirements. *Id.* at 455. Applying the *Loudermill* standard, the Third Circuit found that the professor had received adequate notice of the charges despite the fact that he was not

informed of the sexual harassment complaint prior to the actual meeting with the dean. Moreover, the Third Circuit found that the professor had had an adequate opportunity to respond to the charges, both at the pre-termination meeting and in the weeks before the Board of Trustee meeting. *Id.* at 457-458.

Even assuming Plaintiff had a property interest in the benefits taken away by sanction, the due process requirements are less than those required for the termination of employment. *See Gillard v. Norris*, 857 F.2d 1095, 1099 (6th Cir. 1988) (person receiving a three day suspension without pay may receive less pre-deprivation procedure than terminated employee because suspension is less severe than termination).

Rutgers has clearly satisfied the *Loudermill* requirements for a pre-deprivation hearing. Dean Foley personally notified Plaintiff of the sexual harassment complaint Ms. Maher had filed against him, giving him an opportunity to respond to the allegations in the complaint both in writing and in person at a meeting with him and his two associate deans. After receiving Plaintiff's initial response to Ms. Maher's allegations, Dean Foley provided an additional opportunity for Plaintiff to submit further materials. Dean Foley and his staff, Associate Deans Noemie Koller and Karen Stubaus, met with the Chairman of the Department of Biological Sciences and a colleague of Plaintiff to discuss his interactions with students and other faculty members. Though Plaintiff argues Dean Foley and his staff did not fully investigate many of the charges, as several of the allegations were not fully proven, Plaintiff's own admissions to several of Ms. Maher's allegations in her complaint demonstrate a clear violation of Rutgers' Code on Sexual Harassment. While Dean Foley and his staff could have conducted additional interviews, their investigation into Dr. Power's numerous violations of the Rutgers' Code of Conduct was sufficient given Dr. Power's own admission to several of the acts. Dean Foley outlined what motivated his decision in his report. Dean Foley gave the Plaintiff numerous opportunities to refute Ms. Maher's allegations, but Dr. Power's own admission to some of the acts of

which Ms. Maher left Dean Foley with no alternative but to determine that Dr. Power had committed sexual harassment.

If the Third Circuit found that the plaintiff in *McDaniels* had due process in his deprivation hearings when he was terminated, the process Plaintiff received, above and beyond that given to the Plaintiff in *McDaniels*, must satisfy due process under the Fourteenth Amendment. Dr. Power knew of the purpose of the meeting with Dean Foley months in advance, spoke with both an attorney and a union representative, responded upon numerous occasions to the charges against him, and received Dean Foley's decision after the pre-deprivation meeting.

Due process merely requires an opportunity to present evidence before the deprivation occurs, not before an initial decision is made regarding the deprivation. *See McDaniels* 59 F.3d 446 (3d Cir. 1995). Plaintiff met with Dean Foley personally, and had almost two months to voice any further objections before the decision was made. The fact that Dean Foley chose not to adopt Plaintiff's interpretation of his admitted acts as not rising to the level of sexual harassment does not impact on the propriety of the pre-deprivation process.

Plaintiffs' final argument is that Dean Foley and his staff were not impartial decision makers. This is also without merit. Employment decisions are typically made by a person in the same organization as the employee. These individuals are "likely targets for claims of bias or improper motive simply because of their positions." *McDaniels*, 59 F.3d at 460. It is not necessary that the initial decision be made be an outside party where there are adequate post-deprivation procedures to address charges of improper motives. *Id.*

Dr. Power charges that Dean Foley and his staff had prejudged him before giving him an opportunity to respond to the allegations. He has not produced any evidence of bias or predetermination beyond mere conjecture. This "evidence" of predetermination does not raise an issue of material fact as to the due process claim.

Plaintiff had several post-deprivation processes available to him. Under the collective bargaining agreement, Plaintiff had the right to a full, evidentiary post-discipline hearing through the grievance process. A discharged or disciplined employee cannot claim a denial of "due process because his pre-termination hearing was held by a biased individual where he has not taken advantage of his right to a post-deprivation hearing before an impartial tribunal that can rectify any possible wrong committed by the initial decisionmaker." *Id.*

Article IX of the Rutgers' AAUP Agreement sets forth a post-discipline grievance procedure providing for neutral arbitration under which grievances may be challenged. Dr. Power did not take advantage of the post-discipline process to challenge Dean Foley's actions. Therefore, he neglected of his own volition to take advantage of the post-discipline procedures. It cannot be said that he was denied due process.

Rutgers provided the plaintiffs with appropriate due process protection. Consequently, Rutgers' motion for summary judgment on plaintiff's due process claim in Count One will be granted.

3. Plaintiff's Second Count Of Alleged Stigmatization of Plaintiff's Reputation Is Without Merit.

The U.S. Supreme Court held that reputation alone is not an interest protected by the due process clause. *Paul v. Davis*, 424 U.S. 693, 709-10 (1976). The Third Circuit applied this decision in *Clark v. Township of Falls*, 890 F.2d 611 (3d Cir. 1989), holding that there was no evidence that the plaintiff had a liberty interest in his reputation. *Id.* at 620. In another Third Circuit case, the court held that the loss of potential clients was not sufficient to transform a reputation interest into a liberty interest. *Strum v. Clark*, 835 F.2d 1009 (3d Cir. 1987).

Dr. Power is still employed by Rutgers and was merely disciplined for his behavior. Therefore, he cannot establish any liberty interest in his reputation due to any supposed defamation. The only allegations Dr. Power makes about

harm to his reputation is the fact that he has not been appointed to several committees and the fact that he believes students have avoided him. These vague and highly speculative allegations cannot rise to the level of a protected liberty interest deserving due process of law.

Furthermore, as previously discussed, Plaintiff received greater due process than what would be required by the Third Circuit in the case of a termination. Therefore, summary judgment is granted dismissing the second cause of action based upon the alleged stigmatization of Dr. Power.

4. The Third Cause of Action for Alleged Breach Of Contract Must Be Dismissed For Failure to Utilize Remedy Procedures as Set Forth In the Collectively Negotiated Agreement.

Plaintiff's Third Cause of Action regards the agreement between himself and Rutgers to investigate the validity of the student evaluations from 1989 and then remand his promotion packet to the committee in the next promotion evaluation period. Defendants here are entitled to summary judgment on this claim because Plaintiff failed to challenge the "breach" through the proper channels laid out under the Rutgers-AAUP Collectively Negotiated Agreement.

First, this Court finds that Dr. Power's agreement with Rutgers had no deadline by which any investigation was to be completed, thus it is unclear that his promotion packet was to be resubmitted in the fall of 1993. Regardless of the lack of a deadline in the agreement, any alleged "breach" of the agreement between the university and a professor may be challenged as a grievance under the Agreement between Rutgers and the AAUP.

Both Plaintiff and Defendants agree that the "breach" is a Category Two Grievance. Under the Agreement, faculty may challenge "alleged violations of University... agreement[s]" and "alleged unjust discipline" such as Category Two grievances through the established Grievance Process. Agmt. Art. IX, §§ A.1-A.3. Furthermore, the Agreement provides that

"[w]hether or not pursued, this procedure shall constitute the sole and exclusive right and remedy of bargaining unit members and the AAUP for any and all claims cognizable under this procedure." *Id.* at §F.4.

Plaintiff argues that Section F.6, the exception to exclusivity of remedy, applies to his grievance. Section F.6 does provide a possibility of proceeding through the courts, however, Section F.6 mandates precise conditions that must exist before the exclusivity of remedy is excused. These steps include: (1) the filing and unfavorable disposition of the grievance must have been exhausted; (2) AAUP must not have timely invoked arbitration; and (3) a court proceeding with respect to the subject matter of the grievance must have been filed within 45 days of the last date that the union could have timely invoked the process. *Id.* at §F.6. Where a contract sets forth a mandatory grievance procedure, a plaintiff must exhaust that procedure before filing a breach of contract claim. *Fregara v. Jet Aviation Business Jets*, 764 F. Supp. 940, 953 (D.N.J. 1991). Because Plaintiff never filed a grievance under Step One, Section F.4 applies, not Section F.6. Therefore, Defendants must be granted summary judgment as to Plaintiff's Third Cause of Action for alleged breach of contract due to Plaintiff's failure to pursue the grievance procedure under the Rutgers-AAUP Collectively Negotiated Agreement.

5. Summary Judgment Must Be Granted As to Count Four Of Plaintiff's Complaint Because Dean Foley's Statement that Dr. Power Sexually Harassed Ms. Maher Is True.

Truth is an absolute defense to a defamation claim. *Lawrence v. Bauer Publishing & Printing Ltd.*, 89 N.J. 451, 460, *cert. denied*, 459 U.S. 999 (1982). Based on Dr. Power's admissions, it is clear that he sexually harassed his graduate student, Eileen Maher. Therefore, Dean Foley's statement to other Rutgers officials that Dr. Power had sexually harassed Ms. Maher is true, and the Fourth Cause of Action alleging defamation must be dismissed.

Dr. Power vigorously asserts he did not commit sexual harassment, though he does admit to the following: brushing the hair from her face; touching her shirt and buttock; asking her to ride in a shopping cart; telling her he might need a leash and collar to prevent her from walking ahead of him; brushing the front of his body against the back of his body while in an excited state; discussing her relationship with her boyfriend; expressing he no longer wished to work with her after she told him she had no romantic interest in him; and responding to her protestations of his conduct with the statement "You have nothing to complain about, it's not as if I've thrown you up against a wall and felt you up!"

Under the law of New Jersey, the conduct to which Dr. Power admits rises to the level of sexual harassment. In *Lehmann v. Toys "R" Us, Inc.*, 132 N.J. 587, 602 (1993), the New Jersey Supreme Court held, "[t]o state a claim for hostile work environment sexual harassment, a female plaintiff must allege conduct that occurred because of her sex and that a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment. *Id.* at 603. Furthermore, the Rutgers University Code defines sexual harassment as:

> Unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made, explicitly or implicitly, a term or condition of an individual's education or employment; (2) submission to, or rejection of, such conduct is used as the basis for decisions affecting an individual's academic standing or employment status; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's learning or work performance, or creating an intimidating, hostile, or offensive learning or work environment.

Under these guidelines, the behavior and statements to which Dr. Power admits clearly demonstrate that Dean Foley's statement that Dr. Power committed sexual harassment was true. Therefore, the Defendants' motion for summary judgment on Plaintiff's Fourth Cause of Action for defamation must be granted.

6. Defendant Dean Foley Is Qualifiedly Immune from Liability for Damages on the First, Second, and Fourth Causes of Action.

Dean Richard Foley, the Dean of the Dr. Power's college at Rutgers, The State University, is a government official. As the Third Circuit has explained:

> Government officials performing discretionary functions generally are shielded from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Shea v. Smith, 966 F.2d 137, 130 (3d Cir. 1992). This is the doctrine of qualified immunity. Since Dr. Power has not identified any conduct of Dean Foley that violates clearly established statutory or constitutional rights, qualified immunity immunizes Dean Foley from any claim for damages under Counts One and Two.

As to the Fourth Cause of Action, for defamation, New Jersey case law recognizes the doctrine of qualified privilege communications regarding employee wrongdoing. The qualified privilege exists because "the public interest presents the 'vital counter policy' that persons should be permitted to communicate without fear of a defamation action." *Fees v. Trow*, 105 N.J. 330, 336 (1987). Clearly, Dean Foley's statements were made in furtherance of a vital public interest, eliminating sexual harassment from the campus of Rutgers. *See Lehmann v. Toys "R" Us, Inc.*, 132 N.J. 587 (1993). The public interest, moral considerations, and the nature of Dean Foley's position would require that he investigate and report allegations of sexual harassment. *See Fees*, 105 N.J. at 339.

Moreover, Dr. Power acknowledges that Dean Foley only communicated his statements to persons who were entitled to know about the outcome of the sexual harassment investigation and the status of Dr. Power's future promotion. As these persons clearly have an interest in the information, Foley's communications fall under a qualified privileged. *Gallo v. Princeton University*, 281 N.J. Super 134, 145-46 (App. Div.), *cert. denied*, 663 A.2d 1359 (1995).

"[W]here the case is one of qualified privilege, and there is not more than a scintilla of evidence of malice, it is the duty of the trial judge to withdraw the issue from consideration of the jury." *Fees*, 105 N.J. at 335. The only way Plaintiff could overcome Dean Foley's qualified privilege would be to show that Dean Foley knew this statement that Dr. Power sexually harassed Ms. Maher was false or in reckless disregard of its truth or falsity. *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125, 151 (1986). Dr. Power has made a number of accusations that Dean Foley had predetermined his guilt before conducting any investigation into the matter based upon his own personal speculations and hearsay. However, these statements do not demonstrate that Dean Foley acted knowingly with malice in stating his conclusions. Plaintiff's accusations do not rise to an issue of material fact as to any possible malice on the part of Dean Foley.

Moreover, Dr. Power's own admissions to several of Ms. Maher's allegations make it plain that Dr. Power, under both the University Code and under applicable law, had committed sexual harassment. Therefore, Dean Foley's conclusion was based upon a definite factual background that compelled Dean Foley to decide that Dr. Power had committed acts of sexual harassment.

Because Dean Foley's communication was qualifiedly privileged, and he did not act knowingly with malice or reckless disregard for the truth of his statement, Dean Foley is immune from liability and the Defendants' motion for summary judgment on Plaintiff's First, Second, and Fourth Causes of Action as to Defendant Foley must be granted.

III. *CONCLUSION*

The undisputed facts do not entitle Plaintiff to relief under any Count of the Complaint. Summary judgment is therefore granted and the complaint is dismissed with prejudice. An appropriate order follows.

/s/ William G. Bassler
William G. Bassler, U.S.D.J.

Dated: Oct 1, 1996

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Dr. Harry POWER,

Plaintiff,

v.

RUTGERS, THE STATE UNIVERSITY and RICHARD FOLEY, DEAN,

Defendants.

Civ. No. 94-4608 (WGB)

ORDER

FILED
OCT 1 1996
AT 8:30 ___ M
WILLIAM T. WALSH
CLERK

This matter having come before the Court on the motion of Defendants Rutgers, The State University, and Dean Richard Foley;

For good cause shown;

It is on this 1st day of October, 1996 ORDERED that motion for summary judgment is GRANTED on all counts, and therefore, Plaintiff's claim is dismissed with prejudice.

/s/ William G. Bassler
WILLIAM G. BASSLER, U.S.D.J.

THE STATE UNIVERSITY OF NEW JERSEY
RUTGERS

Office of the Dean • Faculty of Arts and Sciences
77 Hamilton Street • P.O. Box 5051
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May 16, 1994

1
EXHIBIT
JUL 05 1995
KATHLEEN A. C[?]O [???]

Memo to: Barbara Bender
Associate Dean
The Graduate School

From: Richard Foley
Dean, FAS

Subject: Sexual Harassment Complaint Against Professor Harry Power

Complaint and Investigation

On September 2, 1993, you forwarded to Associate Dean Karen Stubaus a signed complaint of sexual harassment against Professor Harry Power from Eileen Maher, a graduate student in the Department of Biological Sciences. In keeping with the University's sexual harassment policy, I investigated the complaint. I have been assisted in this investigation by Associate Dean Karen Stubaus and Associate Dean Noemie Koller.

History and Chronology of the Complaint

On July 7, you phoned Karen Stubaus to tell her that a possible sexual harassment complaint concerning an FAS faculty member had been brought to your attention. Karen Stubaus spoke to you that day, learned the name of the student and the name of the faculty member, and agreed with you that she would call the student in question and assure her of the seriousness with which the University regarded issues of sexual harassment. You also informed Dean Stubaus at that time that Professor Power, anticipating a sexual harassment charge, had written a letter to Professor Thomas Meagher, Director of the

Graduate Program in Ecology and Evolution, and Professor Emmet Dennis, Vice Chair for Academic Affairs in the Department of Biological Sciences, regarding Eileen Maher, and the fact that "she left the study area in the company of her father and headed home for Long Island last Saturday (6/26/93)." That letter included an attachment purporting to be Professor Powers' "General Notes" (a kind of diary) for the period in question. Professor Meagher responded to Professor Power on July 9, 1993 that "As you might imagine, this whole matter will have to be investigated by the University. Allegations of the type you describe lie beyond my province as Program Director, and consequently I have forwarded your correspondence to Barbara Bender in the Graduate School." On September 2, 1993, you transmitted the actual signed complaint, which you had just received, to Karen Stubaus in the FAS Dean's Office. Dean Stubaus is the FAS Affirmative Action Officer and is my designee with regard to the investigation of sexual harassment complaints. On September 10, 1993, the complaint was transmitted to Professor Power by Dean Stubaus, with a cover letter stating that "If you would like to make a written response to the complaint, we would appreciate receiving that response in the FAS Dean's Office within 7-10 working days .... After the Dean has received your response, he may ask Dean Noemie Koller and myself to meet with you and discuss the complaint and your response." Professor Power had requested, and thus Dean Stubaus enclosed with a copy of the complaint itself, a copy of the University's procedures for investigating charges of sexual harassment.

Professor Power came to the FAS Dean's Office on the afternoon of September 10 to pick up the complaint. In a telephone conversation with Dean Stubaus earlier in the day, to arrange for transmittal of the complaint, he characterized Eileen Maher as having had an "hysterical blow-up Sunday the 20th of June." He also said that "It was impossible to deal with her," and gave his opinion that she might have a brain tumor. He asked Dean Stubaus if she herself were married, and also asked her if she had children, oddly personal comments to make to an Affirmative Action Officer transmitting a

sexual harassment complaint. Furthermore, he made the statement that "hitting on is not harassment," with reference to Eileen Maher.

The next communication in this complaint came from Harry W. Power, M.D., Professor Power's father, who apparently lives in Great Falls, Montana. The letter was addressed to Dean Stubaus, and was in the form of a rebuttal to Ms. Maher's allegations of sexual harassment. One of the items it specifically addressed was the following in Eileen Maher's complaint (pages 1 and 2):

> After about another half an hour he brought me out some cookies for "being a good girl." His parents arrived around noon to bring the laundry. We went inside to have coffee and he brought out a pair of high delivery forceps that his grandfather had supposedly developed. He said in front of his parents that if I wasn't a good girl he was going to use them on me. He thought he was being very funny, but it was quite obvious that neither I nor his parents thought it was a very amusing thing to say.

With regard to this incident, Professor Power's father wrote the following, after describing the actual incident differently:

> In conclusion, I have great difficulty in accepting a discussion of the use of certain medical instruments in a very fundamental biological procedure as giving birth to a child as sexual harassment. The accusation is absurd and suggests very strongly that Ms. Maher was under severe emotional pressure. Her urban background, relative isolation at night in a mountainous area and severe disappointment in the failure of her research project because of weather could easily produce severe emotional reactions and paranoia. If emotional behavior as a result of adverse natural conditions such as weather can be utilized to destroy reputations on the basis of sexual harassment, this gives the accuser a "bottomless pit"

> in which to destroy another person. This has previously been described by one word--calumny.

Dean Stubaus did not respond to the letter from Professor Power's father.

On September 22, Professor Power phoned Dean Stubaus's office and left a message with a secretary that he needed until October 11 to reply to Eileen Maher's complaint. Dean Stubaus wrote back to Professor Power that an extension until the close of business on September 27 could be granted. The result was a fax from Dr. Power's attorney, Michael H. Sussman, stating that Harry Power had retained him "to represent his interests as he defends himself against a written complaint of sexual harassment filed by a graduate student." Mr. Sussman again requested the extension until October 11, stating that

> While your desire for an expeditious investigation is understandable and logical, it cannot countervail the need by the respondent for sufficient time to reply to the Complaint. I note that thirty days is *not* an inordinate time for such a response, particularly when the stakes--to a man's career and personal reputation--are so high.

The extension was granted; Professor Power's reply and 11 appendices were received in the FAS Dean's Office on October 9, 1993.

With the written complaint and the written reply now in hand, I and my staff began attempts to schedule a meeting with Professor Power to discuss the charges. Rosemarie Dudek, my administrative assistant, began attempting to do so, but Professor Power insisted on bringing his attorney for the case, which was not in keeping with the kind of meeting I wished to have. Finally, on November 12, 1993, I wrote to Professor Power that

> University policy and the law require us to investigate sexual harassment complaints. Therefore, I am directing you to meet with Associate Dean Noemie

> Koller and Karen Stubaus of my staff to discuss the complaint that has been filed against you. I understand that Rosemarie Dudek, my administrative assistant, has tentatively scheduled a meeting for Monday, November 22, 1993 at 9:30 a.m. at the FAS Dean's Office for this purpose, and that you are holding that time free on your calendar. I will not consent to having your attorney present. You are, of course, entitled to have an AAUP representative present if you wish.

This memo was met with a reply from attorney Michael Sussman, dated November 18, who insisted on being present at any meeting and who closed his letter to me by stating "As of now, we will consider the November 22, 1993 meeting adjourned pending resolution of this important matter." As a result, no meeting was held on November 22.

On December 14, 1 again wrote to Professor Power and stated,

> As you know, I received a communication from your attorney, Michael H. Sussman, on November 18, 1993 regarding the meeting I had scheduled with you for November 22, 1993 to discuss the sexual harassment complaint filed against you. You and Mr. Sussman were insisting that the meeting be held in his presence; I did not wish to have attorneys present, and the meeting was subsequently cancelled.
>
> I am writing to you now to inform you that, after due consideration, my position is still the same. We do not wish to meet with your attorney, we wish to meet with you. As I have stated before, you may bring an AAUP representative with you if you like.
>
> Please call Rosemarie Dudek, my administrative assistant, to schedule the meeting. If we do not hear from you before the University closes on December

> 23 for the Christmas break, we will conduct our investigation based on the documents submitted.

Professor Power responded to my memo of December 14 on the afternoon of December 21, stated that he had consulted with his attorney and with the AAUP, and as a result replied in the following:

> I look forward to meeting with you personally as well as appropriate members of your staff sometime next semester to discuss the charge against me. Your previous memo implied that you would not be present but only represented by Deans Koller and Stubaus. Your presence is important to the resolution of this case because Dean Stubaus' handling of this matter (and my related promotion grievance) has been unsatisfactory.
>
> I will be bringing an AAUP representative. However, because AAUP is essentially shut down until after the first of the year, I cannot now schedule a precise meeting time. AAUP will hold a meeting on 1/4/94 to decide who will accompany me to the meeting with you and your staff. Only after the AAUP meeting will it be possible for me to contact Rosemarie Dudek and schedule a precise meeting time with you as the calendars of several people will have to be coordinated.

Ms. Dudek tried to contact Professor Power to set up a meeting the first week after Christmas break, after I decided to give Professor Power the benefit of the doubt and not make a determination based on the documents submitted. Her attempts were unsuccessful. On January 11, 1994, Richard Wasson, AAUP Grievance I Chair, wrote the following in a letter to me:

> As you may know the AAUP is to provide a representative to Professor Harry Power, Biological Sciences to accompany him to a meeting with Associate Dean Karen Stubaus. Unfortunately,

because so many faculty are away during intercession, we have been unable to make contact with the appropriate parties. We will continue to make every effort to reach suitable faculty members as quickly as possible. Professor Power asked the [sic] we apprise you of the situation.

No word was forthcoming from Professor Power. Finally, Ms. Dudek succeeded in reaching him on February 25. He told her that he was working with "the Law School" to "provide a professor of law" to attend the meeting with him, but that it still hadn't been worked out. He told Ms. Dudek that he was not sure that he would be able to schedule a meeting before spring break, and might be able to schedule a meeting by the end of March. Ms. Dudek next spoke to Dr. Power on March 9, and the dates of March 24, March 28, and March 29 were put "on hold" for a possible meeting. The meeting was finally held on March 28, 1994, in the FAS Dean's Office at 77 Hamilton Street at 1:00 p.m. In attendance were Professor Power, Professor John Payne from the Newark Law School, Associate Dean Noemie Koller, Associate Dean Karen Stubaus, and myself. I opened the meeting with the statement that the purpose of the meeting was to let Professor Power add anything he wished to his written statement. Professor Payne noted that he wanted to reiterate the position of attorney Michael Sussman, that he should be consulted before a decision was reached on the case.

Having brought with him photographs of Montana, a map of Cascade County, Montana, a can of dog and bear repellant, and the "Lonesome Dove" issue of *TV Guide* to assist him in making his points, Professor Power stated that isolation and "weather stress" often make people "go bonkers" and "go after each other." (The map and photographs were designed to demonstrate isolation; the "Lonesome

> Dove" issue of *TV Guide* discussed the bad weather the West suffered that summer. If I recall correctly, Professor Power said that he had given a can of the repellant to Ms. Maher, thus demonstrating his interest in her safety and her ability to defend herself against human or animal attackers.) He attributed Eileen Maher's accusations against him to the effects of that isolation and weather stress, and also to her "irrationality," to his suspicion that she might be suffering from "borderline personality disorder," a "neurological disorder," and/or an "odd temporal lobe condition," and that a physician he consulted about her thinks she should have an electroencephalogram. Professor Power also stated that he and his father think she has a brain tumor; at one point he said "I think she's nuts." Professor Power had additional documents with him that had not been attached to his written response. At the end of the meeting I asked for copies of those documents; Professor Power did not have copies with him, but stated that he would provide them.
>
> The documents in question were provided on March 31, following a call from Ms. Dudek requesting them.

The Complaint

As previously noted, Eileen Maher submitted a formal complaint of sexual harassment to you on September 3, 1993. A copy of the complaint in its entirety is attached; I will just review some of its more alarming aspects here.

The incidents, which constituted a pattern of harassing behavior, took place during Ms. Maher's fieldwork in Stockett, Montana, between May 11, 1993 and June 26, 1993. The first questionable incident occurred on Sunday, May 16, 1993:

> We never even went out to census [the bird box trail] that morning as we were supposed to, instead we stayed at his house and cleaned out his shed.

> After we were working for about half an hour he asked me "where's my hug?" and walked up to me and put his arm around my waist. He then said in a domineering voice "I like hugs, OK!". I was at a loss as to what to say; it was such a strange thing to declare to your graduate student.

That was not the only incident on that particular day. Soon after the "hug" request, Eileen Maher states that Professor Power "brought me out some cookies for 'being a good girl.'" Subsequently, "His parents arrived around noon to bring the laundry."

> We went inside to have coffee and he brought out a pair of high delivery forceps that his grandfather had supposedly developed. He said in front of his parents that if I wasn't a good girl he was going to use them on me. He thought he was being very funny, but it was quite obvious that neither I nor his parents thought it was a very amusing thing to say. After his parents left we moved his gym equipment into his front room. While I was standing at the door looking out with my back to the room Harry walked by and ran his finger down my back. He also asked me what my bra size was, when I wouldn't answer him he kept saying "come on I told you mine why won't you tell me yours." He asked me around four or five times before he got the picture that I wasn't going to tell him.

All of this happened on one day: the request for a hug, the cookies for being a good girl, the remark about the forceps, and the inquiries regarding the bra size.

This day was followed immediately by one in which Professor Power reportedly told Ms. Maher about his need for a girlfriend, expressed his opinions regarding the appropriateness of her boyfriend, and wanted to know whether Ms. Maher, his advisee, thought of him as an old man or not. And Professor Power's inappropriate behavior continued. On May 20,

> while looking for a pencil in my pocket he asked if he could help me feel around in my pockets for it. On that day and on several other occasions he took it upon himself to brush the hair out of my face. Later when back at the cabin while I was sitting at the kitchen table he came up behind me and massaged my neck. The next day he came to my cabin to drop off some things and he came up behind me again and tried to grab my neck again but I moved out of his reach as soon as I realized what he was trying to do. On Friday 28-May I went to town with him to get a part for my car. While we were eating lunch in a local bar/restaurant he asked me if I was going to make him cookies soon or was he "going to have to spank me...."

According to Eileen Maher's statement, the incidents continued.

May 15--"...he said if I didn't slow down he was going to put me on a leash. 'A black leather leash with silver studs.'"

June 3--"...while walking on the trail Harry asked me if I was going to slow down or was he going to have to jump me?" "...he said that he wanted to wrestle with me to 'see how strong I was', and he had been asking me for several days to work out with him but I kept saying no."

The following incident is particularly disturbing to me:

> On 7-June I was climbing a telephone pole to check a bird box. I reached the box (-6 ft off the ground) and was about to open it when Harry, who was on the ground behind me, lifted up my shirt. I swung around (almost falling off the pole because it had been raining and the pegs were slippery) and asked him what he thought he was doing. He said that he was checking my layers and just laughed. Later on the same day I was at his house (because we had to watch to see if any of the nestlings had fledged), as we were getting ready to leave (he had to drive me

> home because it had been too wet and muddy for me to take my car) he asked me if I was going to be nice and stop being so hostile toward him. I said that if he would control himself I wouldn't have to be hostile and then he said 'Well, it's not as if I have thrown you up against the wall and felt you up, but I want to.'

There would be more before Ms. Maher managed to leave Montana. On June 9

> we were sitting out in the field watching a bluebird family and it was hot and sunny out so, were were talking about how the bugs were going to be get [sic] bad and if we were going to wear T-shirts we were going to need Cutter's. He said that I could put it on his arms and back and that he would put it on mine (I didn't understand the need to have someone else put it on). Then he mentioned that he had a hairy back and that for him to wear tank tops he needed someone to shave his back. He said 'You can give me a clipping sometime.'

June 10: "he said that he 'had never been around a woman for so much time and been so rejected.'"

June 12:

> ...he drove me home after I did fieldwork at his house. We went into the garage to check on the box in the yard. The box is visible through a window in the garage and the birds are not disturbed that way. In front of the window is a work bench. I was leaning up against the work bench looking out the window at a bird and Harry came up behind me and pointed at a bird out the window, as he pointed he leaned his front up against my back, I was trapped between the bench and him until he moved.

Eileen Maher continues: "As the days past [sic] and it was becoming quite obvious that I would do anything to stay away from him he became more and more depressed and

pessimistic. He believed that all the birds would die due to the unseasonable amount of rain, he disagreed with anything I said; he even contradicted himself in order to disagree with me. As I was in Montana on my own research grant money I decided to continue on my project myself."

> On 19-June he started talking about me being able to leave in a few weeks, whereas a few weeks before he was telling me that I should stay later than the previously planned on date of 2-Aug. It was quite apparent that he wanted me to leave because I wouldn't be his playmate.

On June 21 and 22 there was an incident around a message Harry wanted Eileen to deliver to Jim Gasvoda, a neighboring rancher, concerning fixing Harry's lawnmower. At about 10:00 a.m. on the morning of June 22, Eileen writes:

> I was just coming back from watching another bluebird family and was off to watch a third when Jim stopped me and said that I had better watch out because Harry was coming up to the cabin to have Jim fix his lawn-mover [sic] and he was in a rage that I hadn't given Jim the message about his lawn-mover. Jim told me that Harry had said if I couldn't even give Jim a message I couldn't be a field technician. Jim said Harry was convinced that due to the weather all my fledges would die (a cynical statement that Harry had started throwing about ever since he realized that I wasn't going to sleep with him) and I should leave as soon as I could pack. This statement was totally false (the birds he had previously predicted would die never did, one example being the above mentioned family) and a complete contradiction of his original goal to observe what happened to the fledges no matter what occurred. If they did die I should stay and observe what was going on and see what happened afterward. All this was just another example of how Harry was thinking about his libido and not as a

> scientist, something that had been going on all summer. It had gotten to the point where I found it difficult to listen to anything he said because he was not thinking about what was best for the project.
>
> I was terrified to see him as I had seen Harry's rages before and I didn't want to see him in that state. I was upset and didn't know what to do so Jim suggested I go in the cabin and not answer the door. I went in the cabin and locked myself in the bathroom because I was so scared.

Eventually, under Jim Gasvoda's protection, Ms. Maher came out of her cabin and went with Jim to the Gasvoda's. Later that afternoon Ms. Maher and Professor Power spoke on the telephone; during that conversation Ms. Maher told Professor Power

> that I didn't appreciate him hitting on me and that I wasn't amused that he was trying to get rid of me because I wasn't going to be his playmate. He said that he only hit on me the first ten days and then he stopped and he said that the birds were dying and there was no reason for me to stay. I said he never stopped hitting on me and I repeated some of the things he had said and he denied everything and said I was paranoid and that I thought I knew more than him and was not listening to him. I got furious and hung up. I called my parents later that night and the Gasvoda's invited me to stay at their house because I was so shaken up. I left two days later after calling the head of the Ecology program Dr. Thomas Meagher and Dr. Henry John-Alder. I had also called my friend Linda Seitz another grad student who told me that the first time she went to discuss something with Harry he told her he was on steroids to build up his body, and had made comments about his sexual prowess. After I left Harry wrote a letter for the Gasvoda's to sign saying that I was crazy and that my father had threatened Harry. Jim said he

> knew it was a pack of lies and wouldn't sign it and Harry got angry. Harry also showed Jim a diary (which according to Jim looked like it was written in one night) which said that it was obvious that I would never be a good field technician (Harry had told both Jim and myself on several occasions that I was a good field tech) and I was paranoid schizophrenic.

Ms. Maher ends her statement with the following:

> After I came home I called Barbara Bender referred to me by Dr. Meagher and she contacted Karen Stubis [sic] who called me. I told them what happened and they told me to submit a journal including everything that went on. I want to stress how upset I am about being placed in this situation, I felt trapped and defenseless because I didn't want to have to end the fieldwork. I feel extremely angry that I had to defend myself from sexual harassment by my advisor (someone I am supposed to be able to trust). Eventually he made it impossible for me to finish my research because I would not be his girlfriend and I had to leave Montana. The research was extremely important to me while the whole matter was considered just one big joke after another to Harry.

The Response

Professor Power's reply to Ms. Maher's complaint was received in my office on October 9, 1993; it consisted of a 57-page reply (to an eight-page complaint) with eleven appendices, including an Appendix 2 "General Notes", purportedly written by Professor Power between May 6, 1993 and June 28, 1993 "in the Calvert rural area of Stockett, Montana." Professor Power wrote, "In essence, these notes are a diary." I will only discuss the reply itself; the appendices are attached for your examination.

I found this reply deeply disturbing. In it, Professor Power flatly denies some of the charges, characterizes others as "half truths," and still others as either "irrelevant" or "defamatory" hearsay. It is often difficult to assess charges of sexual harassment because they frequently consist of one person's word against another, and that is partly the case here. His denials did not either surprise or disturb me, nor did they convince me of his innocence. What did disturb me was Professor Power's seeming complete lack of understanding regarding what constitutes appropriate behavior for a faculty member towards a student. I was also alarmed at the lack of remorse in Professor Power's document, and for his lack of understanding of the seriousness of what he apparently considered to be minor incidents.

For instance, Ms. Maher stated in her complaint that Professor Power ran his finger down her back and asked her what her bra size was. He denies having done so. He does not leave it at that, however, but instead writes on page five of his response "I never touched her in an inappropriate manner or asked her what her bra size was at any time. On the latter matter, I believe she is confusing her bra size with mine. Let me explain." He then launches into a completely irrelevant discussion of his history with weight training, and what that has done to his pectoral muscles, characterizing himself in this document, a response to a sexual harassment complaint, as having "a reasonably lean, muscular body for a 48 year old American male (a notoriously fat, flabby and out of shape age and gender group)." There was also much discourse on the laundry, who washed it, who sorted it, and Professor Power's rhetorical question of "Why would I be interested in asking her for her bra size when I had her freshly laundered bras in my hands on a weekly basis?" The laundry should not have been done together. Professor Power, the senior faculty member, should simply have informed Ms. Maher where the laundry facilities were and have left it up to her to take care of her own clothes. In short, I found what seems to be the pseudo-domesticity of sharing laundry to be inappropriate in a faculty member/graduate student relationship.

Just as inappropriate, to my mind, were the conversations Professor Power reports he and Eileen Maher had in the very earliest days of the field research, conversations Professor Power thinks are normal and standard "between people with time to spare" but conversations I find to be inappropriate between an older faculty member and a young student doing field research together. It is my opinion that it was part of Professor Power's responsibility as the faculty member to steer discussion away from such personal issues. For instance, he reports of May 17:

> Our conversation began with these professional matters then gradually moved in other directions as conversations often do between people with time to spare (we had no bird work to do until the following morning; anyone who has ever had a conversation with a stranger on a plane or in a waiting room has probably exchanged similar personal information).
>
> The conversation included a fairly detailed consideration of her relationship with her boyfriend, Mel (a medical student at NYU), her hopes and aspirations for the future, and my own hopes for a new wife sometime in the future. (I am divorced). There was nothing unwelcome or inappropriate about any of these topics as we were coworkers in an isolated location, a situation where people *have to talk* just to keep a wall of silent hostility from developing.

While I find such conversations to be on the borderline of what is appropriate between faculty and student, I can only assume that they often occur. I do not fault Ms. Maher, as the younger and less experienced individual in this matter, for discussing her personal life with Dr. Power, particularly if, as she says, she was even then trying to fend off his advances. I do think, however, that it was inappropriate of Professor Power to discuss his "hopes for a new wife" with a young, female, single graduate student alone with him in a field situation where she needed his support to continue her research. And Professor Power admits in his reply to the

complaint that he was personally interested in Ms. Maher at the beginning of the field season, and that he pursued the possibility of a relationship with her for a time. Consider these statements of Professor Power's (page 8 of his reply):

> We talked about her boyfriend because, as she notes in her complaint, she kept bringing him up, apparently as a foil to what she perceived as my approaching her about having a romantic relationship. *There's some truth in her perception of what I was doing* [emphasis added] but she overstates the case. *I was definately [sic] interested in whether she had any romantic interest in me because she had been sending me ambivalent signals since the first full day of joint fieldwork, 5/12/93.*
>
> We were both effectively "high" (in a behavioral, not a drug, sense) for those preceding 5 days: we were intensely enthusiastic about being in Montana (a glorious improvement over NJ), the birds we saw (over 50 species not normally encountered on campus, including rare species), the beauty of the study area (it would be a national park if it were in the East), and the weather (by far the best weather of the field season). And our personal relations were very warm. *This led me to want to know what fraction of her enthusiasm pertained to me, personally.* After all, men my age (48) have been marrying women her age (26) for tens of thousands of years, a noticeable fraction of the male Rutgers professoriate are married to their former graduate students, we were both single, and she had effectively propositioned me back in NJ in January, but I had pretended not to have understood her (see G.1 below).
>
> Hence, I asked in a round-about way whether she had any interest in me. I never propositioned her, made sex a prerequisite for anything, or even asked her out for a date. I was simply curious about where *she* thought I fit into her life. As it turned out, she

> made it clear I didn't fit into her life at all, except as a kind of "sugar daddy" (see below). She did this through her description of her relationship with her boyfriend.

Professor Power apparently thinks he cannot have been guilty of sexual harassment in this regard because he never "propositioned her, made sex a prerequisite for anything, or even asked her out for a date." Sexual harassment as defined in the University's policy is broader than that, however. According to the current *Procedures for Making Complaints Under the University Policy on Sexual Harassment*, distributed to members of the University community by President Lawrence on March 26, 1993, sexual harassment is defined as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical contact of a sexual nature constitute sexual harassment when (1) submission to such conduct is made, explicitly or implicitly, a term or condition of an individual's education or

[page missing in original]

> appears to have blotted that criterion out of her memory in order to maintain the illusion that I was "hitting on her."
>
> *Everyone involved in this matter must seriously entertain the possibility that Eileen Maher filed her complaint, and behaved in rude and insubordinate manner that she did from 5/17/93 on because I effectively scorned her by stating my age/experience criterion.*

I find this interpretation of events to be absolutely incredible. I do not believe that Ms. Maher filed her complaint not because she was disturbed and offended by his actions, but because she had hoped to be his future wife and had been scorned. Moving on in Professor Power's reply, I do not accept his contention that brushing the hair out of a graduate

student's face is "neither a seductive nor an aggressive gesture," but merely "physical instruction in the manner of a coach." I also found his request that she make him cookies while in the field completely inappropriate, and not at all as he interprets it, as "purely in the context of easy things she could do to show appreciation for all that was being done for her, and that would be mutually beneficial." I do not understand the connection between this statement of Professor Power's, that "Cookies are an example of a high energy food useful in field work," and the notion that the cookies should be baked by his female graduate student. I am not sympathetic to his complaints on page 16 that the cookies, finally baked, were not tasty. He notes that "The first batch was cooked at such high temperature that the cookies were literally too hard to eat." "The second batch wasn't overcooked, but it was inedible; obviously the recipe hadn't been followed." Professor Power finally gave up on the cookies. " I never asked her to cook again .... Thus the fundamental social bond necessary between professor and student for the mentor-protoge [sic] relationship to work was wilfully destroyed by the student." I do not know if it is necessary to comment on this line of reasoning; I find it completely unacceptable, as Dean of FAS, that the relationship between graduate faculty member and graduate student include the baking of cookies.

It is probably not necessary to detail every portion of Professor Power's reply that I find objectionable; the reply in its entirety is attached. A few more examples may suffice. Note, for instance, the discussion on page 22 of a comment made to Ms. Maher by Professor Power. She reports that he said the following: "Well, it's not as if I have thrown you up against the wall and felt you up, but I want to." His defense is that he did not say that he *wanted* to; he asserts that he said instead, "You have nothing to complain about, it's not as if I've thrown you up against a wall and felt you up!"

It is bad enough that he made that statement to a graduate student who was upset at his unwanted advances. What is just as disturbing is the paragraph that follows, in which Professor

Power "explains" that comment, an explanation that reveals a view of male/female relations that is truly alarming:

> The image I stated about throwing her up against the wall and feeling her up was one that I have carried since high school when I saw exactly that done to a girl by her boyfriend after she had taunted and humiliated him in front of his friends for about an hour. He did it to dominate her thoroughly and publicly, and it worked, i.e., she began to enjoy it after a few seconds of struggle and was polite to him for the rest of the evening (this occurred at a high school dance; I was one of about a dozen spectators). I have often thought that this girl deliberately provoked her boyfriend in public to stimulate exactly the response she got ....
>
> Sometimes during the summer I wondered if Eileen was similarly provoking me, i.e., some women deliberately provoke men to see how much they can get away with just as children often provoke their parents to test the limits. (My former mother-in-law was such a woman; she used to like to humiliate my former father-in-law at family gatherings; finally they got divorced). As I said in my General Notes for 6/22/93, such "man-handling" behavior isn't my style and never has been.

It is clear to me from Professor Power's document, the one he prepared in his own defense, that he did not see himself in relation to Eileen Maher as graduate faculty member to graduate student, but as older man to younger woman, divorced man to single female. The total impact of her short statement and his long one with multiple appendices is to lead me to conclude that Professor Power did not maintain the appropriate kind of professional relationship with Ms. Maher. That Professor Power could have been so blind to issues surrounding sexual harassment is astounding to me in the context of the national press attention currently being paid to the issue, as well as the concern regarding these issues in the

academic world. To this must be added the issue of sexually inappropriate remarks that was raised in Professor Power's most recent promotion evaluation. When he was evaluated for promotion during the 1991-92 academic year, the FAS Appointments and Promotions Committee noted the following:

> In regard to his teaching and mentoring, Professor Power's material presents a mixed picture. He has a good record of graduate student supervision and since 1982, of advising productivity (1 post-doc., 4 Ph.D.'s and 2 M.S.'s). Available evaluations of his upper level undergraduate teaching was provided. At the introductory undergraduate level, however, there appears to be serious problems. In many cases, students refer to Professor Power's excessive speed in lecturing and his caustic and opinionated style. Statistically, his ratings seem to be about average. However, there are a number of students who report that in his Spring 1989, section of General Biology he made many sexually explicit remarks that offended them. These remarks, if as cited, would go well beyond the range of what might be considered reasonable in the teaching of reproductive behavior, specifically: comments including "him wanting to have sex with every female in the room to the size of his genitals" seems a particularly inappropriate and personalized comment, which is cited as "rude and offensive" by the same student, and probably contributed to comments about rudeness and obnoxiousness from others. The committee agrees that if this indeed happened it would constitute a form of sexual harassment in the classroom.

And the Promotion Review Committee noted similarly that

> Professor Power's teaching record ... raises serious concerns. It appears that a number of students have complained about Professor Power's classroom demeanor and comments, including sexually explicit remarks, which some students have found offensive.

> Other student complaints are directed at his excessive lecturing speed, his refusal to repeat or explain concepts, his discouragement of questions, and his caustic and opinionated style.

The Promotion Review Committee voted not to recommend Professor Power for promotion to Professor I. Professor Power grieved that outcome, and won his grievance. The instructions for the remanded evaluation following the successful grievance included the request that I, as Dean, in conjunction with the Chair of Biological Sciences, conduct a thorough review of "specific charges made by several students in Biology 102 in spring 1989 concerning sexually inappropriate remarks." I thus went back to the 1991-92 promotion packet and read the student comments for General Biology, Spring 1989. Among them were the following:

--I really do not appreciate the perverted remarks given by Dr. Power in references to 'getting laid.' This is not professional and I think he's very sickening.

--Dr. Power is not very professional with his many references to sex.

--I felt that Dr. H. Power was an arrogant teacher who had no concern for the feelings of others in his lecture. Out of all the lectures he had given, there was only one lecture that he did not say one sexual comment. His comments ranged from him wanting to have sex with every female in the room to the size of his genitals. I found him rude and offensive.

I found those comments disturbing in and of themselves, but particularly in the context of Ms. Maher's statement. Equally disturbing were conversations members of my staff had with several faculty members in the Department of Biological Sciences. They were very fearful of being identified by Professor Power and thus I cannot go into detail regarding incidents or individuals, but they recounted a history of Professor Power as both a violent individual and as one who regularly made sexually inappropriate comments to students and one who, in an incident well known in the Department, had attempted to

grab both breasts of a new female graduate student in one of the halls in Nelson Labs. They also spoke of how he has retaliated against those who do not support him, students and faculty alike. When asked why none of these incidents had been reported to the Dean's Office before, the faculty members replied that "no one thought the Administration would do anything about it," and that everyone was afraid Harry would find out, and would "go after them," both physically and professionally. They found it easier and safer to go about their business and to stay out of his way.

Obviously, this situation cannot be permitted to continue.

Findings

To summarize: In the course of investigating this complaint, I or members of my staff designated by me spoke to several members of the Department of Biological Sciences, examined the documents submitted by Ms. Maher and Dr. Power, spoke with you, spoke with Ms. Maher, spoke with Ms. Maher's father, and read the documents in Professor Power's official personnel file in the FAS Dean's Office. Under the terms of the *Procedures for Making Complaints Under the University Policy on Sexual Harassment*, distributed to the University community by President Francis Lawrence via a memorandum of March 26, 1993, it is my duty to "send a written statement of [my] findings and a description of the actions taken, if any, to the individual who initially referred the complaint." I have determined on the basis of the investigation conducted by me and my staff and on the documents submitted that Professor Power engaged in sexually harassing behavior with regard to his graduate student, Eileen Maher. In addition, Professor Power's personnel file reveals that sexually inappropriate and offensive comments have been an issue in Professor Power's teaching evaluations in the past. Further, several individuals noted Dr. Power's reputation as a violent person, some having actually witnessed his outbursts. These aspects of Professor Power's behavior and teaching disturb me, as well as leave me concerned regarding the physical safety of those around Dr. Power. In light of all I have read

and heard, I feel it is advisable that we in the University take the following actions:

--Professor Power will not be permitted to be alone with undergraduate or graduate students, male or female, on an individual basis, for at least three years, and only then if there have been no complaints regarding his behavior or his comments in class. Students will not be able to sign up for independent study or independent research with him; he will be assigned no graduate students or post-doctoral students. No students will be permitted to work on his grants. Office hours for his courses will be held in some public area in the Department of Biological Sciences, where he can be observed. He will not be assigned teaching assistants or graders.

--Teaching evaluations of both his undergraduate and graduate classes will be conducted each semester. The evaluations will be closely monitored for any indications of sexually inappropriate comments, or other inappropriate comments or behavior.

--Professor Power will not be evaluated for promotion to full professor for at least three years; the earliest that such consideration will take place will be academic year 1997-98. He will only be considered in that year if there have been no reports of sexually inappropriate behavior, or otherwise offensive behavior, in the classroom or out.

--The department chair, the graduate program director, the dean and associate deans of the Graduate School, and the dean and associate deans of FAS, will all be informed of this finding and should be responsible for ensuring that it is upheld in their respective areas.

In closing, I cannot overemphasize how disturbed I am by what I heard and read regarding Dr. Power's behavior. It is my hope that these findings will both safeguard those around him and encourage him to alter his behavior for the better, so that he can return to the customary duties of a faculty member at this University.

No. 97-510

(2)

Supreme Court, U.S.
FILED
OCT 17 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DR. HARRY POWER,

Petitioner,

—vs.—

RUTGERS, THE STATE UNIVERSITY
and RICHARD FOLEY, DEAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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32 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the courts below properly conclude that a public university professor did not have constitutionally-protected property interests in being considered for a promotion, in meeting with students alone, and having student assistants?

2. Did the courts below properly conclude that a public university professor received constitutionally-sufficient notice and opportunity to respond to sexual harassment charges for which the discipline was neither employment termination nor suspension?

LIST OF PARTIES TO THIS PROCEEDING*

Petitioner:

DR. HARRY POWER

Respondents:

RUTGERS, THE STATE UNIVERSITY

DEAN RICHARD FOLEY

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* The United States District Court for the District of New Jersey granted Respondent Dean Richard Foley's motion for summary judgment on all counts on the grounds of qualified immunity and qualified privilege. The Third Circuit affirmed and Petitioner Dr. Harry Power has not sought to challenge that ruling in his petition to this Court.

TABLE OF CONTENTS

	PAGE
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
LIST OF PARTIES TO THIS PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	2
A. Proceedings Below	2
B. Facts	3
1. Sexual Harassment Complaint Against Power	3
2. Power's Response to the Sexual Harassment Complaint	5
3. Further Responses to the Sexual Harassment Complaint	9
4. Other Student Complaints About Power	10
5. Power's 1992 Promotion Denial	12
6. Faculty Complaints About Power	13
7. Discipline Imposed on Power for Sexually Harassing Maher	13

PAGE

8. Lack of Property Rights 14

9. Grievance Procedure and Power's Failure to Grieve..... 14

REASONS FOR DENYING THE WRIT..... 15

A. The Lower Courts' Decision That Power Had No Constitutionally Protectable Property Interests Impaired by the Sanctions Imposed upon Him for Sexually Harassing Maher is a Correct Application of the Well-Settled Decisions of this Court to the Specific Facts of this Case 15

1. The Lower Courts Correctly Determined That Power Had No Property Right to be Considered for a Promotion, to Meet with Students Alone, or to Have Student Assistants .. 16

2. The Lower Courts' Decision is a Fact Specific Application of the Well-Settled Precedent of this Court and Does Not Warrant this Court's Exercise of its Discretion to Grant Certiorari.... 18

3. The Second Circuit's Decision in *Ezekwo v. Health and Hospitals Corporation* Lends No Support to Power's Claim That the Benefits Impacted by the University's Discipline of Him Constitute "Property" 19

PAGE

B. The Lower Courts' Decision that Power Received All of the Process to Which He Was Due Prior to Receiving Discipline is a Correct Application of the Well-Settled Decisions of this Court to the Specific Facts of this Case 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases PAGE

Bishop v. Wood, 426 U.S. 341 (1976) 15-17

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 15, 16, 18

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 21, 22

Driggens v. City of Oklahoma City, 954 F.2d 1511 (10th Cir.), *cert. denied*, 506 U.S. 843 (1992) 18

Dykes v. Southeastern Pa. Transp. Authority, 68 F.3d 1564 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1434 (1996) 23

Ezekwo v. Health and Hospitals Corporation, 940 F.2d 775 (2d Cir.), *cert. denied*, 502 U.S. 1013 (1991) 19, 20

Gilbert v. Homar, 520 U.S. ___, 138 L. Ed. 2d 120 (1997) 15, 22

Kovats v. Rutgers, The State University, 822 F.2d 1303 (3d Cir. 1987) 16

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 15, 18, 19

Maples v. Martin, 858 F.2d 1546 (11th Cir. 1988) 23

Morley's Auto Body, Inc. v. Hunter, 70 F.3d 1209 (11th Cir. 1995) 18

NLRB v. Pittsburgh Steamship Co., 340 U.S. 498 (1951) 19

Perry v. Sindermann, 408 U.S. 593 (1972) 15, 20

PAGE

Varma v. Bloustein, 721 F. Supp. 66 (D.N.J. 1988), *aff'd*, 860 F.2d 1075 (3d Cir. 1988), *cert. denied*, 489 U.S. 1014 (1989) 16

Constitutional Provision

U.S. Const., Amend. XIV (Due Process Clause) 15

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RESPONDENTS' BRIEF IN OPPOSITION

Respondent Rutgers, The State University, respectfully requests that this Court deny the petition for a writ of certiorari. The petition raises no "special and important reasons" for granting a writ of certiorari. Rather, the petition seeks to challenge the lower courts' correct application, to the particular facts of this case, of this Court's well-settled precedent as to what constitutes a public employee's property interest within the meaning of the Due Process Clause and what satisfies minimal due process requisites for the discipline of a public employee, that does not result in the employee's termination or suspension.

STATEMENT OF THE CASE

A. Proceedings Below

In September 1994, Dr. Harry Power, a tenured associate professor of biological sciences at the New Brunswick, New Jersey campus of Rutgers, The State University ("Rutgers"), filed a lawsuit against Rutgers and Richard Foley, the Dean of the Faculty of Arts and Sciences (FAS) at Rutgers' New Brunswick campus. In his first and second causes of action, Power alleged Rutgers and Foley deprived him of property and stigmatized his reputation without due process of law when they imposed certain restrictions upon him after concluding he had sexually harassed a female graduate student. In his third cause of action, Power alleged Rutgers breached an agreement to investigate the validity of student complaints about Power's use of sexual, sexist, and vulgar language in class, and, thereafter, to reevaluate him for promotion. In his fourth cause of action, Power alleged that Foley defamed him by communicating to several Rutgers' administrators his conclusion that Power had committed sexual harassment.

On April 12, 1996, Rutgers and Foley moved for summary judgment. Except where necessary to correct Power's incorrect recitation of the deposition testimony of the eight Rutgers' administrators and faculty he deposed (Ja 1920-1944),[1] Rutgers and Foley relied almost exclusively upon Power's deposition testimony and Power's written response to the sexual harassment complaint against him, as providing the undisputed material facts in support of their motion (Ja 40-66).

On October 1, 1996, the district court granted complete summary judgment to Rutgers and Foley, holding: (1) Power was not deprived of a constitutionally-protected property

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[1] "Ja" refers to the Joint Appendix filed with the United States Court of Appeals for the Third Circuit.

"Pet. App." refers to the Appendix to Petitioner's Petition.

interest (Pet. App. A-13 – A-14), but even if he had been, he had received all the process due (Pet. App. A-14 – A-18); (2) reputation alone is not a constitutionally-protected liberty interest (Pet. App. A-18 – A-19), but even if it were and even if Power had been deprived of it, he had received all the process due (Pet. App. A-19); (3) Power failed to allege a breach of contract claim (Pet. App. A-19), but even if he had, the claim was barred by his failure to utilize the collectively-negotiated grievance procedure in the contract between Rutgers and his union (Pet. App. A-19 – A-20); (4) Foley's statement to other Rutgers officials that Power sexually harassed the female graduate student was true based on Power's admissions, and truth is an absolute defense to a defamation claim (Pet. App. A-20 – A-22); and (5) Foley was qualifiedly immune from the due process claims and qualifiedly privileged on the defamation claim (Pet. App. A-22 – A-23).

Power appealed to the United States Court of Appeals for the Third Circuit from the district court's October 1, 1996 Order. By Judgment Order dated June 24, 1997, the Third Circuit summarily affirmed the judgment of the district court in its entirety. (Pet. App. A-1 – A-2).

B. Facts

1. Sexual Harassment Complaint Against Power

In the fall of 1992, a female graduate student, Eileen Maher, began graduate study in New Jersey at Rutgers in its Department of Biological Sciences, Power's department. Within the first two months of her study, at which time she knew nothing about mountain bluebirds, Power suggested Maher apply for a grant to study mountain bluebirds at his study site in Montana (Ja 91-92). Power even assisted Maher in obtaining the grant by dictating her grant application (Ja 91-92). Thereafter, Maher was awarded the grant and in early May 1993, she and Power went to Montana (Ja 104).

Maher's field research was to have lasted two-and-a-half months. After only five-and-a-half weeks, however, Maher abandoned her research and fled Montana to escape Power's repeated acts of sexual harassment and retaliation (Ja 104, 519). So fearful was Maher of Power, that during her last several days in Montana, she stayed in the home of the family whose cabin she was renting, rather than the cabin itself, until her father could arrive and accompany her home (Ja 380-381, 1905-1906).

In late June of 1993, as soon as Power learned Maher had left Montana, he wrote to his Graduate Program Director Thomas Meagher and Department Vice Chair Emmett Dennis, preemptively denying that he had committed sexual harassment. In his letter, Power stated that any forthcoming accusation Maher might make along those lines were the result of her being delusional. He further theorized that such delusions might stem from Maher possibly having a brain tumor, her exposure to toxins, or paranoid schizophrenia (Ja 337-338).

In September 1993, after speaking with University administrators regarding Rutgers' sexual harassment policy, Maher submitted an eigh-page sexual harassment complaint (Ja 375-382) to Graduate School Associate Dean Barbara Bender. Bender is the person designated by the sexual harassment policy to receive complaints of graduate students (Ja 382, 141 ¶ 1, 145, 1814-1815).

In her complaint, Maher alleged that while in Montana, Power had subjected her to repeated unwelcome touchings and sexually-related comments, including: coming to her cabin, denigrating her boyfriend, and expressing his own interest in her (Ja 376); retaliating against her after she told Power that she was happy with her boyfriend and not interested in Power (Ja 378-380); showing her a pair of high delivery obstetrical forceps and telling her he would use them on her if she were not a "good girl" (Ja 376); brushing the hair from her face (Ja 376); asking her to make him cookies,

and threatening to spank her if she failed to do so (Ja 377); asking her to ride in the child's seat of a grocery cart (Ja 377); threatening to jump on her to slow her down and keep her from walking ahead of him (Ja 377); threatening to place her on a leash made of black leather and silver studs (Ja 377); lifting up the back of her shirt while she was climbing a pole (Ja 377); pinning her against a bench by placing the front of his body in contact with her back (Ja 378); running his finger down her back and asking her what her bra size was (Ja 376); and responding to her pleas to "control himself" by telling her, "Well, it's not as if I have thrown you up against the wall and felt you up, but I want to" (Ja 377).

Pursuant to Rutgers' sexual harassment policy, Bender forwarded Maher's complaint to the FAS Dean's Office for resolution (Ja 141 ¶ 3, 383). Karen Stubaus, the FAS Associate Dean for Administration and Personnel, immediately forwarded the complaint to Power for response (Ja 383).

2. Power's Response to the Sexual Harassment Complaint

In October 1993, Power submitted a 148-page response (55 pages of single-spaced typewritten text and 11 multi-page appendices), to Maher's eight-page complaint (Ja 384 to 531). Although Power denied that he had engaged in sexual harassment, he admitted much of the conduct of which Maher complained.[2]

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[2] Power's failure to seek review here of the lower courts' conclusion that Power had sexually harassed Maher as a matter of law, and therefore Foley's statement to that effect was true (Pet. App. A-20-A-22), essentially means that Power no longer disputes that he engaged in sexual harassment. At bottom, therefore, Power's petition is simply a technical argument as to whether he was disciplined for only that misconduct, or whether other acts of his misconduct entered into the discipline decision. (Petition at 19-20). Before the Court may even consider this "notice" argument, however, it must first accept Power's argument that the discipline he received for engaging in sexual harassment, the suspension of certain non-wage benefits, affected constitutionally-protected

Power admitted that soon after her arrival in Montana, he had gone to Maher's cabin to ascertain whether she had any romantic interest in him. In the course of this discussion, he disparaged Maher's boyfriend, and told her of his interest in finding a wife (Ja 390-396):

> We talked about her boyfriend because, as she notes in her complaint, she kept bringing him up, apparently as a foil to what she perceived as my approaching her about having a romantic relationship. There's some truth in her perception of what I was doing. . . . *I was definately [sic] interested in whether she had any romantic interest in me* . . .
>
> We were both effectively "high" (in a behavioral, not a drug, sense) for those preceding 5 days. We were intensely enthusiastic about being in Montana . . . . *This led me to want to know what fraction of her enthusiasm pertained to me personally.* After all, men my age (48) have been marrying women her age (26) for tens of thousands of years . . . .
>
> Hence, I asked in a round-about way whether she had any interest in me. . . .

(Ja 391) (emphasis in original). Maher informed Power she was not romantically interested in him (Ja 391). According to Power's response, from that point forward, he "felt a deep sense of revulsion and disgust toward her" (Ja 395):

> I knew as of that moment (i) that I wanted nothing whatsoever to do with her (be it professional or social), (ii) that I regretted having brought her out to Montana and having indirectly asked whether she had any romantic interest in me . . . .

"property" interests such that due process notice and hearing requirements arose. (Petition at 12-19). As demonstrated herein, Power cannot prevail on either argument, much less both.

(Ja 395-396).[3]

Power also admitted: showing her a pair of high delivery obstetrical forceps, and did not deny that he told her he would use them on her if she were not a "good girl" (Ja 376, 388, 488-89); brushing "the hair out of [Maher's] face 1-3 times in the first week or 2 of the field season" (Ja 396); asking "her to make cookies for *us*, cookies that *we* could share" (Ja 398) (emphasis in original); asking Maher if she wanted to ride in the child's seat of a grocery cart (Ja 377, 400); asking Maher "if the only way I could get her to walk next to me in the field was to jump on her and hold her down" (Ja 401); asking "her if I had to put a leash and collar on her in order to get her to walk at a correct distance" (Ja 401);[4] "grab[bing] her but-

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[3] Contrary to Petitioner's suggestion (Pet. App. n. 2), the district court did not rely on misleadingly selected excerpts of Power's deposition testimony when it concluded that Power began his relationship with Maher for personal reasons, and thereafter, wanted to discontinue the professional relationship after she informed him she was happy with her boyfriend and not interested in him. Furthermore, Petitioner's statement that Power testified that he wanted to continue the professional relationship (*Id.*), is simply wrong.

> Q. Did you leave that conversation that day thinking she was or wasn't romantically interested in you?
>
> A. I left the conversation thinking that she was not romantically interested in me, and I regretted ever having anything to do with her.
>
> * * *
>
> Q. Don't you state in your reply starting on Page 12, among other things, you state, "[I] knew as of that moment . . . that I wanted nothing whatsoever to do with her, be it professional or social"?
>
> A. Yes. That's my view. I did not wish to continue a professional relationship. However, I was in a situation where I could not easily end it.

(Ja 125).

[4] Power denied only Maher's statement that the leash of which he spoke was "black leather" with "silver studs" (Ja 401, 377).

tocks" while Maher was climbing a pole and as she descended "her open jacket began to slip over my head and the untucked tail of her shirt brushed across my face" (Ja 404); and "brush[ing] against her" while "very excited" (Ja 408-409).

Although in his response, Power denied Maher's accusation that he had asked her about her bra size, he explained:

> I believe she is confusing her bra size with mine.

(Ja 388); and

> Why would I be interested in asking her for her bra size when I had her freshly laundered bras in my hands on a weekly basis?

(Ja 389).

Power also admitted that Maher had objected to his behavior and had pleaded with him to "control himself", and that his response to her was "to the effect that it was not as though she never has been manhandled. What was her problem?" (Ja 108). Power also admitted that when Maher accused Power of making sexual advances, he indignantly replied, "you have nothing to complain about, it's not as if I've thrown you up against a wall and felt you up" (Ja 405). As to the last remark, Power explained:

> The image I stated about throwing her up against the wall and feeling her up was one that I have carried since high school when I saw exactly that done to a girl by her boyfriend after she had taunted and humiliated him in front of his friends for about an hour. He did it to dominate her thoroughly and publicly, and it worked, i.e., she began to enjoy it after a few seconds of struggle and was polite to him for the rest of the evening (this occurred at a high school dance; I was one of about a dozen spectators). I have often thought that this girl deliberately provoked her boyfriend in public to stimulate exactly the response she got. (There was a lot of exhibitionism in

> her behavior; she was a cheerleader and the prettiest girl in my graduating class, and he was a star athlete; she made sure they were the star attraction of the evening by her behavior).
>
> Sometimes during the summer I wondered if Eileen was similarly provoking me, i.e., some women deliberately provoke men to see how much they can get away with just as children often provoke their parents to test the limits.

(Ja 405).

3. Further Responses to the Sexual Harassment Complaint

Despite Power's self-incriminating response which Dean Foley and his associate deans Noemie Koller and Karen Stubaus read, and properly read, as a confession of acts of sexual harassment and retaliation,[5] Foley and his staff met with Power and his union representative on March 28, 1994,[6] to give him an additional opportunity to respond to Maher's allegations (Ja 114).

At this meeting, Power supplemented his earlier 148-page response through: his purported recounting of an opinion of a forensic psychiatrist that Maher should undergo an electroencephalogram because her sexual harassment claims may have stemmed from an odd temporal lobe form of epilepsy or a borderline personality disorder (Ja 120-123, 538-539); maps

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[5] Dean Foley and Associate Dean Koller testified the conclusion of sexual harassment was based largely on Power's express admissions and lack of denials of acts alleged as set forth in Power's response (Ja 990-1034, 1656-1667, 1671-1672). Similarly, Associate Dean Stubaus testified "Dr. Power's reply . . . was a major factor in our conclusion that Professor Harry Power had an inappropriately sexual attitude towards or—or orientation towards this graduate student" (Ja 1349).

[6] The meeting originally scheduled for November 22, 1993, was repeatedly delayed by Power (Ja 532-536, 111-114).

and photographs of Montana, news articles, and an issue of the *TV Guide* to support his theory that Maher's sexual harassment claims may have stemmed from stress caused by isolation and the weather (Ja 121, 537-539); and an "aerosol can of concentrated capsicum" (a wild animal repellant), to demonstrate that Maher could have defended herself against his physical assaults (Ja 539).

At the conclusion of the meeting, Dean Foley gave Power another opportunity to respond to Maher's complaint, by inviting him to submit additional documentation. Power availed himself of this opportunity and submitted a 40-page document consisting of a memorandum with appendices on March 31, 1994 (Ja 537-577).

4. Other Student Complaints About Power

During the 20 years Power has taught at Rutgers, students, in written evaluations, have regularly complained about Power's repeated use of sexual, vulgar, and sexist comments in class, *e.g.*:

> His language (fuck, goddamn, son-of-a-bitch, etc.) is most unnecessary.

(Ja 198).

> Fou[l] language offends me, especially when it isn't necessary.

(Ja 206).

> . . . arrogant, sarcastic, rude and sexist . . .

(Ja 206).

> His use of colloquial, rather crude words and phrases was unnecessary, unappreciated, and inappropriate.

(Ja 208).

> Sexist comments, chavaunistic [sic] . . . .

(Ja 210).

> . . . highly non-professional language. . . . His views and studies of women are obviously secondary. . . . a reference to a "feminist stage" . . .

(Ja 211).

> I really do not appreciate the perverted remarks given by Dr. Power in references to "getting laid"

(Ja 253).

> Dr. Power is not very professional with his many references to sex

(Ja 254).

> Out of all the lectures he had given, there was only one lecture that he did not say one sexual comment. His comments ranged from him wanting to have sex with every female in the room to the size of his genitals.

(Ja 254).

> I don't like his vulgar manner either.

(Ja 255). These student evaluations form a part of Power's personnel file. (Ja 36 ¶ 7).

In response to an inquiry by Associate Dean Koller about some of these comments, Power did not deny that he had remarked upon the size of his genitals in class. Rather, Power defended the comment as relevant to the course material (Ja 907-908, 928-929). In response to another inquiry regarding Power's classroom comments from Foley's predecessor Dean McCormick to Power's department chair David Denhardt, Denhardt assured McCormick that the department had investigated Power's classroom remarks and considered them to be "an unfortunate incident" and that "Harry has learned a lesson and will be more circumspect in the future" (Ja 217-218, 584).

5. Power's 1992 Promotion Denial

Partly because of concerns about Power's classroom use of sexual and other inappropriate language, and partly because of concerns about his publication rate and teaching effectiveness, Power was denied promotion to the rank of professor in 1992 (Ja 216).

Pursuant to the tenure and promotion provisions of the collectively-negotiated agreement (Agreement) between Rutgers and the Rutgers Council of AAUP Chapters (AAUP), the union which represents Rutgers faculty, Power grieved the denial of his promotion (Ja 101, 162, 284-305). In March 1993, the Grievance Committee, a tribunal of faculty members designated by the Agreement to resolve grievances arising out of the promotion process, rejected eleven of the twelve bases Power had advanced in support of his grievance (Ja 173 ¶ F.2.a, 309-334). However, the Grievance Committee found that the student comments regarding Power's repeated use of vulgar and sexually explicit comments in class had infected Power's promotion proceedings without a definitive judgment having been made as to their validity (Ja 316).

On April 30, 1993, to implement the Grievance Committee's decision, Rutgers and Power agreed that Power's dean, Foley, along with Power's department chair, Denhardt, would undertake a "full inquiry of the student complaints," and thereafter prepare a formal report to be included in Power's promotion packet when his credentials were to be reevaluated in the future (Ja 335-336). This agreement (the "remand agreement") set no time period for completing the report or conducting the reevaluation (Ja 335-336).

Before this inquiry, report, and reevaluation were implemented, the FAS dean's office became aware of Maher's sexual harassment complaint, and, in consultation with Rutgers' Assistant Vice President for Faculty Affairs,

> . . . determined that the public interest had to be paramount in this case and that the university could not be in a position of putting forward for promotion someone who had an open charge of sexual harassment, and that we should hold off beginning the remand.

(Ja 1314).

6. Faculty Complaints About Power

Independent of the March 28 meeting with Power about the sexual harassment complaint, on March 29, 1994, Associate Deans Koller and Stubaus met with the current and former directors of the ecology graduate program, Joanna Burger and Thomas Meagher, to address

> [A] separate concern which had been voiced to Noemie Koller by Joanna Burger . . . and perhaps other faculty members in the Department of Biological Sciences being physically afraid of Harry Power and wanting the dean's office to do something about it.

(Ja 1372-1376). Additionally, Meagher and Burger shared their knowledge relevant to Maher's sexual harassment complaint against Power. Burger added that Power had told her "that the only thing he had done was suggested they [Power and Maher] might have a dating relationship, and that he had told [Maher] one time that she should walk sufficiently close to hold hands" (Ja 1056).

7. Discipline Imposed on Power for Sexually Harassing Maher

By letter of May 16, 1994, Dean Foley advised Power that he had determined that Power had sexually harassed Maher and informed Power of the restrictions Dean Foley was imposing: Power was prohibited from meeting alone with students for three years; Power was prohibited from having teaching or research assistants for three years; and Power

could not be evaluated for promotion for three years (Ja 578-579).

By a separate May 16, 1994 letter which Dean Foley sent only to Graduate School Associate Dean Bender, Foley gave a more detailed report of how he had resolved the Maher complaint against Power (Ja 593-607). In addition to referring to the numerous admissions Power had made in his written response to the complaint (Ja 601-603), Foley also referred to the student comments about Power's classroom use of vulgarities, that are contained in Power's personnel file which he and his staff reviewed in resolution of the Maher complaint (Ja 605-606, 36 ¶ 7). Foley also noted to Bender that he was disturbed by reports from Power's faculty colleagues in the Biological Sciences Department about their perception of Power as a potentially violent person (Ja 606).

8. Lack of Property Rights

By Power's own admission, no written document confers upon him a "right" to meet with students alone, to have research or teaching assistants, to make inappropriate remarks in class, not to be disciplined, or to be promoted (Ja 81-82).

9. Grievance Procedure and Power's Failure to Grieve

The Rutgers-AAUP Agreement sets forth a detailed grievance and arbitration procedure by which faculty may contest disciplines imposed upon them (Ja 154). At Step One of the procedure, the grievant may be assisted by two AAUP representatives (Ja 158 ¶ D.6). A grievant may, thereafter, appeal a denial of his grievance at Step One to neutral arbitration, at which the grievant may be represented by counsel, present witnesses, and cross examine witnesses against him (Ja 158-159 ¶¶ E.1-E.10, 39 ¶ 4).

Power considered, but decided not to file, a grievance challenging either the discipline for sexual harassment or the fact

that the remanded evaluation had not taken place (Ja 98, 103, 124). Power made this decision not to file a grievance after consultation with his attorney and his union representative (Ja 98, 103, 124).

REASONS FOR DENYING THE WRIT

A. The Lower Courts' Decision That Power Had No Constitutionally Protectable Property Interests Impaired by the Sanctions Imposed upon Him for Sexually Harassing Maher, is a Correct Application of the Well-Settled Decisions of this Court to the Specific Facts of this Case.

This Court has long held that "[t]he hallmark of property . . . is an individual entitlement grounded upon state law. . . ." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *see also Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Absent a clear demonstration that an interest is recognized as "property" under state law, no due process issue arises. *See Bishop v. Wood*, 426 U.S. 341, 345-46 (1976). Even then, only certain "substantial" interests rise to the level of property interests protected by the procedural due process guarantees of the Fourteenth Amendment.

> It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives. . . .

Roth, 408 U.S. at 577; *see also Logan*, 455 U.S. at 430-30 (discussing the substantial nature of the right to bring discrimination law claims).[7] As this Court emphasized in *Roth*:

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[7] Indeed, in the employment context, this Court has recognized as constitutionally-protected property interests only those types of employment which are terminable only for cause. *See Roth*, 408 U.S. at 578; *Perry v. Sindermann*, 408 U.S. 593 (1972); *cf. Gilbert v. Homar*, 520 U.S. __, 138 L. Ed. 2d 120, 126 (1997) (Court assumed, without deciding, that suspension without pay of a tenured public employee constituted the

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .

408 U.S. at 577. As demonstrated herein, the lower courts correctly determined that none of Power's asserted interests rose to the level of a constitutionally protected property interest.

1. The Lower Courts Correctly Determined That Power Had No Property Right to be Considered for a Promotion, or to Meet with Students Alone or Have Student Assistants.

Relying on earlier precedent from the United States Court of Appeals for the Third Circuit and the United States District Court for the District of New Jersey, which had interpreted New Jersey law to hold that Rutgers' tenure and promotion procedures do not create property interests, the lower courts held that Power did not have a constitutionally-protected property right in the opportunity to be considered for a promotion under those procedures. (Pet. App. A-13—District Court Opinion citing *Kovats v. Rutgers, The State University*, 822 F.2d 1303 (3d Cir. 1987); *Varma v. Bloustein*, 721 F. Supp. 66 (D.N.J. 1988), *aff'd*, 860 F.2d 1075 (3d Cir. 1988), *cert. denied*, 489 U.S. 1014 (1989)). Rather, the lower courts held that Power's interest in being considered for a promotion amounted to an "abstract type of unilateral expectation" which this Court has held does not rise to the level of constitutionally-protected "property." (Pet. App. A-13).

The lower court's analysis and determination was entirely consistent with this Court's prior decision in *Bishop*. At issue

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deprivation of a property interest for the purpose of determining due process supplied in any event). The discipline Power seeks to challenge here involves neither the discharge of his employment nor the suspension of his pay.

there was a claim by a discharged public employee in North Carolina that a city ordinance, which set forth the reasons for which city employees could be dismissed, created a property right which entitled him to due process protections prior to his discharge. In holding against the employee, this Court relied on the interpretation of the ordinance by a United States District Judge in North Carolina, that the ordinance did not create a property interest in employment.

> In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of the particular states unless their conclusions are shown to be unreasonable. . . On such questions we pay great deference to the views of judges of those courts 'who are familiar with the intricacies and trends of local practice.'

Bishop, 426 U.S. 341, 345-46 n. 10 (citations omitted). As Power's claim to be "considered for a promotion" has less of a connection to Rutgers' tenure and promotion process than the claim for employment had to the dismissal ordinance at issue in *Bishop*, the lower courts' decision that Power's claim does not amount to a property right, is entitled to even greater deference. In any event, Power has pointed to no record evidence demonstrating that his interest in being considered for promotion is a recognized property right under state law.[8]

Power has also pointed to no record evidence that state law recognizes that there exists a "mutually explicit understand-

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[8] Power's claim that the lower courts failed to consider his argument that the remand agreement created a property right, is incorrect. (Petition at 14-15). That agreement, which arose out of the grievance process of Rutgers' tenure and promotion procedures, stated that Power would be re-evaluated for promotion after the University investigated the validity of student comments concerning Power's repeated use of vulgar and sexual remarks in the classroom (Ja 335-36). Thus, the lower courts' decision that Power did not have a property interest in being considered for promotion subsumed Power's argument that the agreement for re-evaluation after an investigation created a property right.

ing" that support a "legitimate claim of entitlement" to meet with students alone and to have student assistants. *Roth*, 408 U.S. at 577. On the contrary, Power admitted that no written document or contract confers upon him a "right" to these benefits (Ja 81-82). Power's reliance on an inference from an isolated statement by Dean Foley concerning the "customary duties of a faculty member" is plainly an insufficient basis for challenging the lower courts' determination that Power has no property right to meet with students alone and to have student assistants. *Roth*, 408 U.S. at 578 n. 16 (fact that the University reappointed a vast majority of faculty, was insufficient to create a "common law of re-employment" to support a property right).[9]

2. The Lower Courts' Decision is a Fact Specific Application of the Well-Settled Precedent of this Court and Does Not Warrant this Court's Exercise of its Discretion to Grant Certiorari.

Power's argument in Point II, § A of his petition that "this Court has not squarely addressed whether certain mutual understandings may predicate a legally-cognizable claim" is misguided for several reasons. (Petition at 16-17).

Power's argument wrongly assumes that for any of the benefits to which he claims he was entitled, there exists record evidence that rises to the requisite level of "rules or understandings that secure benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577. Further,

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[9] In several places in his petition, Power invokes the incorrect legal standard, by asserting that a "rational factfinder" could have concluded that his claimed interests rose to the level of constitutionally protected property. (Petition at 14, 15). The issue of what is "property" is a legal, not a factual, issue that must be determined by reference to state law. *See Logan*, 455 U.S. at 430; *Morley's Auto Body, Inc. v. Hunter*, 70 F.3d 1209, 1212 n. 3 (11th Cir. 1995) (error for district court to submit to jury the legal issue of whether a policy created a property interest); *Driggens v. City of Oklahoma City*, 954 F.2d 1511, 1513 (10th Cir.), *cert. denied*, 506 U.S. 843 (1992) (same).

Power's argument ignores that such determinations must be made by reference to state law. *Logan*, 455 U.S. at 430 ("property" determinations are grounded upon state law). As discussed above, the lower courts correctly decided there was no record evidence to suggest that state law recognizes Power's entitlement to be considered for a promotion, to meet with students alone, or to have student assistants.

Finally, Power's argument wrongly assumes that this Court's failure to "squarely address" whether his specific claimed entitlements rise to the level of "a legally-cognizable property interest," warrants a grant of certiorari. This Court has made clear that "[c]ertiorari is granted only 'in cases involving principles the settlement of which is of importance to the public *as distinguished from that of the parties*. . . .' " *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) (citations omitted) (emphasis added).

3. The Second Circuit's Decision in *Ezekwo v. Health and Hospitals Corporation* Lends No Support to Power's Claim That the Benefits Impacted by the University's Discipline of Him, Constitute "Property".

As demonstrated above, the lower courts, applying the well-settled holdings of this Court, correctly concluded that Power had failed to show that his interests in being considered for a promotion, meeting with students alone, and having student assistants, were recognized by state law as "property". In Point II, § B of his Petition, under the guise of claiming a "split" in the decisions of the circuit courts (Petition at 17-19), Power relies on a single case from the United States Court of Appeals of the Second Circuit, *Ezekwo v. Health and Hospitals Corporation*, 940 F.2d 775 (2d Cir.), *cert. denied*, 502 U.S. 1013 (1991). As demonstrated herein, however, that case lends no support to Power's claims.

In *Ezekwo*, the Second Circuit held that a hospital's long-established and documented practice of rotating its residents into the position of Chief Resident, and its specific advice to Ezekwo that she would also be rotated into that position, created a property interest under state law. *Ezekwo*, 940 F.2d at 782-83. The Chief Resident position carried with it additional job responsibilities, an increase in salary and greater prestige. *Id.* at 777. In finding a property interest, the Second Circuit emphasized that the record, including hospital brochures, demonstrated that the hospital's rotation plan was an "established practice." *Id.* at 782. It also emphasized that the hospital's failure to rotate Ezekwo into the position of Chief Resident "was not the result of routine discipline." *Id.*

Unlike Ezekwo who cited to documentary and testimonial evidence that clearly established the rotation practice she claimed, Power failed to cite to any record evidence that confers upon him a "right" to meet with students alone or to have student assistants. Also unlike Ezekwo, who had demonstrated an established right to a definite position, Power merely claims a right to be "considered for a promotion." A right to a definite position has been recognized as a constitutionally-protected property interest (*see Perry*, 408 U.S. at 603 (right to professorship)), while Power's claimed right is merely an "abstract type of unilateral expectation" which does not rise to that level. (Pet. App. A-13). Finally, unlike the denial to Ezekwo of the Chief Resident position, the suspension of some of Power's benefits *was* the result of routine discipline.

B. The Lower Courts' Decision That Power Received All of the Process to Which He Was Due Prior to Receiving Discipline, is a Correct Application of the Well-Settled Decisions of this Court to the Specific Facts of this Case.

This Court has held that before terminating the employment of a public employee having a property interest in his or her

job, the employer need only provide the employee with "oral or written notice of the charges against [the employee], an explanation of the employer's evidence, and an opportunity to present [the employee's] side of the story." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985).

Here, university professor Power was charged with, and disciplined for, sexual harassment of student Maher. As to this charge, the record amply supports the lower courts' decision that Power had substantial notice and multiple opportunities to respond, and Power does not contend otherwise. (*See* Pet. App. A-16 – A-18; Ja 375-82, 384-531, 537-77).

Nevertheless, Power argues that he was denied due process because he contends that Foley based the discipline on charges of which Power purportedly had no notice. (Petition at 19-20). Power bases his assertion on Foley's reference in his separate report to Associate Dean Bender, to student course evaluations describing inappropriate sexual remarks made by Power in classes and allegations made by department colleagues on March 29, 1994 that Power was a violent person who regularly made sexually inappropriate comments (Ja 606).

However, the record evidence makes clear that Power was disciplined only for sexually harassing Maher, and that other allegations of Power's misconduct had no effect on the discipline. Foley's May 16, 1994 letter to Power refers to no incident other than Power's sexual harassment of Maher, and thereafter, lists the discipline imposed for that offense. (Ja 578). Furthermore, the precise discipline set forth in that May 16, 1994 letter to Power was discussed on March 28, 1994, by Dean Foley with his Associate Deans, Stubaus and Koller, following their meeting with Harry Power that day (Ja 1216-1220, 1226-1230, 586-592). Further still, as of March 28, 1994, the three deans had no doubt that Dr. Power had sexually harassed Eileen Maher, no doubt that discipline would be imposed, and no doubt as to the precise nature of that disci-

pline (*Id.*). Indeed, during the March 28, 1994 meeting, Stubaus drafted the sanctions, which, except for specific time periods and other minor details, were identical to the sanctions Foley imposed on Power in his May 16 letter (Ja 588).

In any event, the decisions of this Court make clear that, at the pre-termination stage, an employer need not present an employee with every bit of evidence that forms the basis of the charge. This Court held in *Loudermill* that the pre-termination requirements' purpose is to "be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." 470 U.S. at 545-46. As this purpose can be satisfied short of presenting every bit of evidence supporting the charge, it follows that not every bit of evidence need be presented at the pre-termination stage. Indeed, this Court recently held that where there are reasonable grounds to believe that the charges against the employee are true, an employer need not provide *any* notice or opportunity to be heard prior to imposing a discipline short of discharge. *Gilbert v. Homar*, 520 U.S. __, 138 L. Ed. 2d 120, 128 (1997) (arrest of police officer provided adequate ground to believe the charges were true and supported suspension without pay, prior to any notice or hearing). It follows that in the circumstances of this case, where Power's own response to Maher's sexual harassment complaint reasonably caused University officials to believe Maher's allegations were true, no further notice to Power was required before the University imposed the non-termination discipline on him. Accordingly, any purported failure to apprise Power of other incidents of misconduct did not violate any due process rights to which he was entitled.

This Court's further holding in *Loudermill*, that the presence and nature of post-termination proceedings permit lesser pre-termination proceedings (470 U.S. at 545), further suggests that where an adequate post-termination procedure

exists, an employer need not present the employee with all of the evidence at the pre-termination stage. Here, Power had available to him, but chose not to utilize, the grievance procedure of the Rutgers-AAUP Agreement to challenge what he perceived to be the "unjust discipline" Foley had imposed on him (Ja 98, 103, 124). That procedure ends in neutral arbitration, at which the parties are permitted to be represented by counsel, present witnesses, and cross examine witnesses against them (Ja 158-159 ¶¶ E.1-E.10, 39 ¶ 4). The availability of this undeniably constitutionally-sufficient post-discipline process, therefore, further undermines Power's assertion of a due process violation. *See Dykes v. Southeastern Pa. Transp. Authority*, 68 F.3d 1564, 1572 and 1572 n.6 (3d Cir. 1995) ("In so holding, we reconfirm our agreement with the many courts holding that the grievance procedures outlined in collective bargaining agreements can satisfy due process requirements."), *cert. denied*, 116 S. Ct. 1434 (1996); *Maples v. Martin*, 858 F.2d 1546, 1550-51 (11th Cir. 1988) (no due process violation when plaintiffs, tenured faculty members, were afforded notice of charges and an opportunity to be heard, and a constitutionally sufficient grievance-arbitration process was available to them).

In sum, assuming that Power had property interests in the benefits impaired by the sanctions Foley imposed on him (which he did not), and even if Power did not receive notice of all of the evidence against him prior to the issuance of the sanctions, he still received all the process to which he was due.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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October 1997

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No. 97-510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DR. HARRY POWER,

Petitioner,

vs.

RUTGERS, THE STATE UNIVERSITY and
RICHARD FOLEY, DEAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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30pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	
A: IN SANCTIONING POWER ON THE BASIS OF ALLEGATIONS TO WHICH HE WAS DENIED AN OPPORTUNITY TO RESPOND, RESPONDENTS UNLAWFULLY DEPRIVED HIM OF THREE PROTECTED PROPERTY INTERESTS	2
B: RESPONDENTS DEPRIVED PETITIONER OF DUE PROCESS BY SANCTIONING HIM ON THE BASIS OF CHARGES TO WHICH HE WAS DENIED AN OPPORTUNITY TO RESPOND	5
C: THE GRIEVANCE PROCEDURE DID NOT PROVIDE PETITIONER SUFFICIENT PROCESS	8
CONCLUSION	10
Appendix	
Letter, Foley to Power, dated May 16, 1997	A-1
Position Statement, National Association of Scholars	A-3

TABLE OF AUTHORITIES

Cases:	Page(s)
Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)	3
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)	7
Perry v. Sindermann, 408 U.S. 593 (1972)	3
Stana v. School District of the City of Pittsburgh, 775 F.2d 122 (3d Cir. 1985)	3

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Petitioner, Harry Power, respectfully submits this brief in reply to respondents' brief in opposition to his certiorari petition. This procedural due process case addresses whether, on a motion for summary judgment, the Third Circuit properly held that petitioner, a tenured professor at Rutgers State University, had sufficient notice of charges that predicated his punishment. While petitioner knew that his employer had charged him with sexually harassing a female graduate student, unrelated allegations — *for which petitioner was denied notice and an opportunity to respond* — also informed the sanctions. Petitioner is hard-pressed to imagine a more blatant

violation of due process principles. As petitioner was deprived of significant property interests without proper notice or an opportunity to respond, certiorari is warranted to correct the lower courts' misapplication of this Court's well-settled principles governing procedural due process.

In their brief, respondents ramble on about petitioner's alleged sexual harassment and reiterate anonymous student complaints about his classroom style. Resp. Brief at 3-11. These arguments are completely irrelevant to the issues before this Court and serve only to obfuscate the real issues, which address procedural due process, not sexual harassment; respondents' inflammatory brief should not confuse this Court.[1]

ARGUMENT

A. IN SANCTIONING POWER ON THE BASIS OF ALLEGATIONS TO WHICH HE WAS DENIED AN OPPORTUNITY TO RESPOND, RESPONDENTS UNLAWFULLY DEPRIVED HIM OF THREE PROTECTED PROPERTY INTERESTS

Respondents agree that property interests may derive from mutually-explicit rules or understandings that secure benefits and support claims of entitlement to them. Resp. Brief at 17-18. While respondents assert that the record does not support petitioner's reliance on university agreements and past practices, that is simply not the case.

---

[1] Annexed hereto as Exhibit 2 is a position statement about sexual harassment and academic freedom from the National Association of Scholars. Petitioner has adopted this statement as reflecting the harm to academic freedom posed by a university's failure to properly handle sexual harassment complaints. As petitioner's sanctions include the threat of further discipline in the event respondents receive additional *complaints* — as opposed to proven charges — of sexually inappropriate behavior, they not only violate his due process rights but his academic freedom; in order to stay out of trouble, petitioner would have to modify his teaching style and content to ward off *any* complaint, no matter how baseless, since a complaint, by itself, can predicate further discipline.

As an initial matter, respondents argue that petitioner's claimed property interests are too trivial to warrant due process protection. Resp. Brief at 15, n.7. Respondents misread *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972) to argue that this Court has only recognized as property interests those employment relationships that are terminable for cause. *Id.* Respondents can cite no authority for the proposition that public employment decisions short of termination lack due process protection.

Petitioner was denied three property interests: (1) the right to be considered for promotion to the rank of full professor; (2) the right to the benefit of his successful grievance and (3) the right to all the privileges accorded faculty members generally. These property rights stem from agreements and past practices for which petitioner had "a legitimate claim of entitlement." *Perry v. Sinderman*, 408 U.S. 593, 602-03 (1972).

First, under the Collective Bargaining Agreement ("CBA") binding the parties, after a successful grievance, a remand review is structured to remedy the deficiencies identified in the flawed promotion process. By April 1993, petitioner and the provost's office had agreed upon an appropriate remand: in conjunction with the Chair of the Department of Biological Sciences, the Dean's office would "undertake . . . a thorough review of this issue and . . . prepare a formal report describing [its] conclusions with regard to the conduct alleged by several of the students in the course [(General Biology, Spring 1989)]". (Ja765). The remand process was to commence as soon as practicable and the results used during the following year's promotion review. (Ja1543).

The agreements and university practices that governed the remand process establish that petitioner reasonably understood that he was entitled to fair consideration for his promotion. *Roth*, 408 U.S. at 576-78. *See also*, *Stana v. School District of the City of Pittsburgh*, 775 F.2d 122, 126 (3d Cir. 1985)("Property interests . . . can also arise from written or unwritten state or local government policies or from mutually explicit understandings between a government employer and

employee") (citation and internal quotation marks omitted). Respondents incorrectly describe this concrete property interest as "abstract." Resp. Brief at 16.

In addition, petitioner reasonably expected a timely remand, which expectation respondents ignored when by staying the remand pending review of Eileen Maher's sexual harassment complaint. *See*, Ja618 ("If the university and the grievant reach agreement concerning the remand, it will be reduced to writing and signed by the University and the grievant. *Such remedy will be implemented promptly*") (emphasis added). As neither the CBA nor any university practice permits the exception that respondents assert (remands may be delayed because of student complaints), they do not explain why petitioner could not reasonably have viewed the delay as an infringement on his property right to a prompt remand.

Finally, respondents trivialize petitioner's claim to a property interest in faculty member privileges. Respondents characterize his interest as the right to meet with students alone or employ student assistants. Resp. Brief at 16. Respondents also argue that petitioner improperly bases his argument on respondent Foley's written comment that the sanctions should alter his behavior "so that he can return to the customary duties of a faculty member at this University." *Id.* at 18. *See also*, Letter, Respondent Foley to Bender, reprinted in Pet.App. at A-49; Letter, Respondent Foley to petitioner, dated May 16, 1994, annexed hereto at App. 1.

In fact, as a tenured professor, petitioner had the right to (1) sponsor graduate students and use them as teaching and research assistants, (2) have office hours and assist his students and (3) apply for research grants, which right the university has violated by precluding him from employing graduate students. These sanctions addressed the heart of petitioner's job responsibilities as a functioning faculty member who needs graduate students to help conduct scientific research. They also deprived petitioner of the kind of support and services necessary to effectively teach, including teaching assistants

and the need to meet privately with students. *Id.* at A-49. As respondent Foley recognized in his May 16, 1994 letters to Barbara Bender, Associate Dean of the Graduate School, and petitioner, these are a faculty member's rights to function in a customary manner. Foley's letter was intended to justify petitioner's sanctions for, *inter alia*, allegedly sexually harassing Maher. As respondent Foley expressed outrage over Maher and others' allegations about petitioner, it is clear that his desire to harshly punish petitioner led him to deny petitioner the usual benefits upon which professors reasonably enjoy and rely.

B. RESPONDENTS DEPRIVED PETITIONER OF DUE PROCESS BY SANCTIONING HIM ON THE BASIS OF CHARGES TO WHICH HE WAS DENIED AN OPPORTUNITY TO RESPOND

Respondents argue that petitioner has erroneously claimed that they punished him for allegations of which he never received notice. In fact, contrary to basic summary judgment principles, respondents examine the record in the light most favorable to their position and argue that petitioner had no right to answer questionable charges about his character before imposing sanctions predicated on those very allegations.

As petitioner has argued, the record establishes that respondents punished him because of Maher's complaint *and* allegations that, *inter alia*, he was a violent person and tried to grope a graduate student's breasts. The latter allegations surfaced during a meeting between respondent Foley and other administrators to discuss Maher's allegations. One day earlier, these administrators met with petitioner to discuss Maher. One University official who attended both meetings, Karen Stubaus, did not know if anyone advised petitioner that his alleged inappropriate classroom comments could affect the resolution of Maher's complaint. (Ja1354-55). In fact, no one had.

In his May 16, 1994 letter to petitioner explaining the sanctions, respondent Foley purports to cite the only evidence used to resolve the charges: Maher's complaint and

petitioner's reply. (Ja578). That letter is annexed hereto at App. 1. However, in the same letter, respondent Foley added, "I cannot overemphasize how disturbed I am *regarding what I read and heard regarding your behavior*. It is my hope that these findings will both safeguard those around you and encourage you to alter your behavior for the better." (Ja579) (emphasis added). Read in the light most favorable to petitioner's position, these statements imply that allegations beyond Maher's sexual harassment complaint — particularly, allegations respecting petitioner's deportment — informed the sanctions.

Indeed, in a separate memorandum that explains the sanctions, respondent Foley expressly cited allegations that petitioner made inappropriate classroom comments, was a violent person and tried to sexually grope a student. Respondent Foley intoned, "Obviously this situation cannot be permitted to continue." Pet.App. A-49. As well, respondent Foley's investigatory "findings" expressly invoke these additional allegations to explain the sanctions. *Id.* Like respondent Foley's letter to petitioner, his memorandum to Barbara Bender expresses concern for "the physical safety of those around Dr. Power" and references "all I have read and heard." *Id.*

Accordingly, respondents cannot persuasively argue that Foley sanctioned petitioner exclusively upon findings that he had harassed Maher, not allegations for which he lacked any notice. Both documents bear the same date, concern the same topic (petitioner's punishment) and employ similar language to express respondent Foley's purported concern for others' safety. Respondent Foley clearly allowed non-sexual harassment allegations to inform petitioners' sanctions.

The record supports the conclusion that the other sanctions bore no relationship to sexual harassment prevention and were designed to address petitioner's other alleged transgressions of which he was denied notice and an opportunity to respond.

While the university asserts that, as early as March 28, 1994, it had determined that petitioner had sexually harassed Maher and to impose discipline, that conclusion resolves

disputed fact issues. As noted, a rational factfinder may conclude that respondent Foley set forth all of petitioner's alleged offenses, sexual and otherwise, in the Bender memorandum for a reason: they informed the sanctions. Stubaus' handwritten notes from the March 28, 1994 meeting reflect that the participants only discussed Maher's complaint, not allegations about petitioner's alleged violent proclivities and other issues that respondent Foley related to Bender. (Ja586-592). *See also*, Ja586 (meeting was arranged to let petitioner further respond to Maher's charges). Respondents have proffered no evidence that they confronted petitioner with any other charges. Indeed, if respondents really determined as early as March 28, 1994 that petitioner had sexually harassed Maher, why did it invite him to submit follow-up materials in response to the allegations? (Ja537-39).

Finally, respondents argue that, even if petitioner's punishment derived from allegations other than Maher's complaint, he was informed of the substance of the evidence against him and respondent need not produce "every bit of evidence" supporting its decision. Resp. brief at 22. This position is untenable and finds no support in this Court's precedents. While *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545-56 (1985) states that pre-termination notice should constitute "a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action," it does not follow that an employer can withhold notice of unrelated charges from the employee and then rely upon them to support his punishment. Maher's charge that petitioner sexually harassed her bore no relevance to allegations that petitioner was a violent man. The former charge did not touch upon the latter and petitioner did not know that these unrelated allegations were on the table until he read respondent Foley's May 16, 1995 memorandum to Bender in discovery.

As due process requires "notice of the charges" against the employee (*Loudermill*, 470 U.S. at 546), this Court should reject respondents' attempt to wriggle out of its failure to properly accord petitioner a chance to reply to charges that he

was a violent man, which charges predicated his punishment and sanctions.

C. THE GRIEVANCE PROCEDURE DID NOT PROVIDE PETITIONER SUFFICIENT PROCESS

While petitioner's sanctions letter hints that the university relied on allegations in addition to Maher's complaint, respondent Foley's contemporaneous memorandum to Bender clearly establishes his intention to punish petitioner for allegations to which he never had an opportunity to respond. Any post-deprivation hearing would have required petitioner to address *every* reason for the sanctions, not just the alleged sexual harassment. However, petitioner did not see respondent Foley's memorandum to Bender until discovery and, *a fortiori*, could not have used it during any post-deprivation process.

Petitioner's ignorance about the substance of respondent Foley's other reasons for sanctioning him undercut the post-deprivation process since he could not have properly addressed the myriad of reasons underlying his punishment. As respondents have not indicated when, if at all, they planned to notify petitioner of the other reasons for the sanctions, they cannot now assert that he failed to avail himself of post-deprivation remedies.

In any event, the CBA grievance procedure did not accord petitioner adequate post-deprivation process since (1) category two grievances, like petitioner's, are subject to advisory, not binding, arbitration under the CBA and (2) there is no requirement that a bargaining unit member exhaust the grievance mechanism if, like petitioner, he has a category two grievance, like imposition of unjust discipline.

Article IX, F.6 of the CBA states:

> Exception as to Category Two Grievances: If the AAUP does not timely invoke Step Two in accordance with Section E.1. above, and the AAUP and/or the grievant commences a court proceeding pertaining to the grievance within 45 days of the last

> date upon which the AAUP could have timely invoked Step Two, the defense of exhaustion of remedies or exclusively of the grievance procedure will not be available to the University in such court proceeding. (Ja161).

Under the CBA, petitioner had at least 125 working days from the date his grievance arose to proceed in federal court. This follows from the time frames established in the CBA: the AAUP has 30 working days to file a Step One grievance; the grievant then has 10 working days to request a meeting with the University Vice President or Assistant Treasurer who has 10 working days to convene the meeting. The Step One provision does not set a date by which the university officer must make a decision on the grievance, but, thereafter, the AAUP has 30 days if dissatisfied to file a Step Two appeal in a Category Two case.

Section F.6. provides the grievant 45 days from the last date the AAUP could have filed a Step Two appeal (for arbitration) to proceed into federal court and avoid any university contention that he failed to exhaust administrative remedies. As petitioner filed this case on September 23, 1994, within 125 working days from notice of the adverse action against him (May 16, 1994), he properly exercised his rights under the CBA and respondents cannot persuasively assert that he did not avail himself of post-deprivation remedies.

CONCLUSION

This Honorable Court should grant the instant petition for certiorari.

Dated: October 31, 1997
Goshen, New York

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May 16, 1994

DEFENDANT'S
EXHIBIT 81
6/22/95 S[?]

JP
JEC
BB

Professor Harry Power
67 Myrtle Avenue
North Plainfield, NJ 07060

Dear Professor Power:

As you know, I and certain members of my staff have been conducting an investigation into the complaint of sexual harassment filed against you by Ms. Eileen Maher, a graduate student in the Department of Biological Sciences, on September 3, 1993. You responded to that complaint in a reply delivered to my office on October 9, 1993. My office experienced a great deal of difficulty in scheduling a meeting with you to discuss the complaint and your response, but a meeting was finally scheduled for March 28, 1994, in my office. At that time you were provided with the opportunity to add anything to your reply that you wished.

I have determined, on the basis of the investigation conducted by me and by members of my staff, that you have engaged in sexually harassing behavior with regard to Ms. Eileen Maher. I therefore intend to take the following actions:

--You will not be permitted to be alone with undergraduate or graduate students, male or female, on an individual basis, for at least three years, and only then if there have been no complaints regarding your behavior or your comments in class. Students will not be able to sign up for independent study or independent research with you; you will be assigned no graduate students or postdoctoral students. No students will be permitted to work on your grants. Office hours for your courses will be held in some public area in the Department of

Biological Sciences, where you can be observed. You will not be assigned teaching assistants or graders.

--Teaching evaluations of both your undergraduate and graduate classes will be conducted each semester. The evaluations will be closely monitored by the department and by my office for any indications of sexually inappropriate comments, or other inappropriate comments or behavior.

--You will not be evaluated for promotion to full professor for at least three years; the earliest such consideration will take place will be academic year 1997–98. You will only be considered in that year if there have been no reports of sexually inappropriate behavior, or otherwise offensive behavior, in the classroom or out.

--The department chair, the graduate program director, the dean and associate deans of the Graduate School, and the associate deans of FAS, will all be informed of this finding insofar as it applies to their respective areas of oversight, and will be responsible for ensuring that it is upheld in their areas.

I cannot overemphasize how disturbed I am by what I read and heard regarding your behavior. It is my hope that these findings will both safeguard those around you and encourage you to alter your behavior for the better, so that you can return to the customary duties of a faculty member at this University.

Sincerely,

/s/
Richard Foley
Dean

bc: J. Ambrose
B. Bender
J. Creeden
E. Dennis
D. Denhardt
S. Hall
N. Koller
F. Loren
T. Meagher
J. Potenza
K. Stubaus

RECEIVED
Office of the Provost and
Grad[?]

MAY 18 1994

SEXUAL HARASSMENT AND ACADEMIC FREEDOM

A Statement of the National Association of Scholars

Sexual harassment is always contemptible. Because it also subverts education, it is particularly damaging in an academic setting.

The National Association of Scholars believes that college and university authorities should respond to instances of sexual harassment promptly and firmly. Tenure does not protect faculty members found guilty of coercing sexual favors. Nor is academic freedom an impediment to the effective enforcement of prohibitions against lesser forms of harassment, such as inappropriate touching, that also exploit individuals and undermine the educational process. Such behavior constitutes a serious violation of an educator's responsibilities and is morally wrong. It cannot be tolerated.

However, academic freedom and the rights of individuals can be — and have been — violated by misguided efforts to combat sexual harassment. Too many institutions have adopted vague definitions of harassment that may all too easily be applied to attitudes or even to a scholar's professional views. Not surprisingly, a chill has descended on academic discussions of sensitive but legitimate topics, such as human sexuality, sex differences, and sexual roles. Worse, procedures have been widely adopted that violate the canons of due process. In a number of cases, the reputations and careers of innocent persons have been severely damaged as a result of unwarranted actions taken by colleges and university authorities.

Specifically:

- The criteria for identifying "harassment" are often nebulous, allowing for expansive interpretation of its meaning. For example, at one major public university, the official definition stated that "Sexual harassment can be as blatant as a rape or as subtle as a look. Harassment . . . often consists of a callous insensitivity to the experience of women"; in another

official publication the university further advised that sexual harassment "is broadly defined to include behavior that may not be considered overtly sexual." Language like this can only breed confusion, resentment, and injustice.

- When definitions of sexual harassment are expanded to include opinions and attitudes, academic freedom is violated. Such definitions have already significantly inhibited discussion inside and outside the classroom. Ambiguous phrases like "callous insensitivity to the experience of women" have inspired complaints against professors accused of slighting gender-based literary analysis, or who have discussed theories and findings, such as Freud's, that run counter to the prevailing consensus about sexual differences.

- Some definitions of sexual harassment embrace a wholly subjective test of its occurrence — for example, the complainant having been made to "feel uncomfortable." Proof relies not on the objective behavior of the alleged harasser but on how one person perceived that behavior.

- Charges of sexual harassment are sometimes entertained long after the alleged offense, when the memories of the parties have faded, their motives have altered, and evidence has been lost.

- Mid-level administrators with meager academic experience but a strong commitment to fashionable causes are frequently accorded a major role in drawing up harassment regulations, interpreting them, counseling complainants, investigating charges, administering hearings, and determining guilt and penalties. Sometimes one and the same person performs all of these functions and, in addition, encourages students and others to make harassment charges. This leads to violations of academic due process.

- Investigations of alleged sexual harassment can provide a pretext for engaging in the ideological persecution of persons whose views are out of favor. When amorphous harassment regulations are enforced over-zealously, they encourage frivolous or self-serving charges from discontented or vindictive individuals.

- Collective penalties have been imposed on entire academic departments and groups of students for the actions, not always proven, of a few individuals. At one prestigious private university, every student, faculty member, and staff member was ordered to attend a three-hour seminar on sexual harassment because a federal agency found fault with the university's judgment in a case involving a single alleged harasser. It need hardly be said that finding persons guilty by association, or making a whole category responsible for actions committed by one or a few, violates the principle of individual responsibility basic to our society. It is likely to arouse resistance against efforts to combat genuine sexual harassment.

- Some of the sanctions now in force aim at thought reform, frequently through compulsory "sensitivity training" programs. These programs often operate to humiliate those suspected of holding "incorrect views." They also frequently suggest that being white, male, or heterosexual constitutes a presumption of guilt. When *required* for faculty or students, these programs constitute an assault on individual dignity and freedom.

What we are witnessing, in short, is the transformation of a clear behavioral offense into a ubiquitous "thought crime" and the substitution of psychological manipulation for rational discussion. The resulting confusion of genuine harassment with less serious acts, and even with beliefs, brings anti-harassment policy into needless conflict with academic freedom. This confusion is bound to diminish the opprobrium that

rightly attaches to sexual harassment. In the interest of protecting students and staff from genuine harassment and of preserving academic freedom, the NAS urges institutions of higher education to:

- define sexual harassment precisely, confining it to individual behavior that is manifestly sexual and that clearly violates the rights of others
- set a reasonable statute of limitations on bringing sexual harassment charges
- separate the offices of investigator, prosecutor, judge, and jury; observe the requirements of due process; and ensure the right of the accused to make an adequate defense
- punish those who knowingly lodge false accusations of harassment, and
- act against proven harassers forcefully, by dismissal if necessary, instead of coercing opinions and restricting speech

Anything less fails to protect students, faculty, and staff from sexual harassment. Anything more threatens individual freedoms and, most conspicuously, academic freedom.

For additional information about the NAS and its activities, including its research center, speakers bureau, search service, newsletter, state and regional affiliates, conferences, fellows program, local events, and the quarterly *Academic Questions,* write to the **National Association of Scholars, 575 Ewing Street, Princeton, New Jersey 08540**, or call **609-683-7878**.

For Reasoned Scholarship in a Free Society